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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1930.

No. [redacted] 43

Bandini Petroleum Company, a corporation; Commodore Petroleum Company, a corporation; Wilshire Oil Company, Inc., a corporation; Wilshire Annex Oil Company, a corporation; and Ambassador Petroleum Company, a corporation,

Appellants,

vs.

The Superior Court of the State of California, in and for the County of Los Angeles, and Honorable William Hazlett, as one of the judges thereof,

Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM, PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1930.
No. 852.

Bandini Petroleum Company, a corporation; Commodore Petroleum Company, a corporation; Wilshire Oil Company, Inc., a corporation; Wilshire Annex Oil Company, a corporation; and Ambassador Petroleum Company, a corporation,

Appellants,

vs.

The Superior Court of the State of California, in and for the County of Los Angeles, and Honorable William Hazlett, as one of the judges thereof,

Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM, PETITION FOR WRIT OF CERTIORARI.

(Note: All references are to the typewritten record filed with the clerk, as same has not yet been printed.)

Appellees' untimely motion to dismiss or affirm is, we respectfully submit, without merit and should be denied.

The statute involved, as construed and applied to the admitted facts, fairly bristles in severities that touch appellants and in the number of substantial federal questions involved, which are of far-reaching importance, not only to appellants but also to the entire oil and gas industry, which is interested in the question of how far the state can go under the police power in regulating the production of oil and gas and in conserving privately owned natural resources for the benefit of the general public, without compensation. There are also other important federal questions presented. The number, and the very nature, novelty, and importance of these federal questions require a somewhat longer brief than is ordinarily the case. While we have not, in the short time allowed by the rule of this court, by any means fully argued and presented the merits thereof, we have gone into the matter sufficiently, we believe, to show that the federal questions involved are of substantial character and require full argument and presentation and thorough consideration upon their merits by this court, and therefore, that the motions to dismiss or affirm should be denied.

I.

Limited Grounds of Motion and Tests to Be Applied.

Said motions and supporting brief are based solely upon the ground that no substantial federal question is involved on the appeal. Appellees thus impliedly admit and concede that there are no other grounds of attack on the jurisdiction of this court, and that this court should deny the motions if it finds a substantial federal question to be involved. However, the "Statement as to Jurisdiction on

Appeal" filed herewith affirmatively shows all of the various essentials of the jurisdiction of this court on this appeal under section 237, U. S. Judicial Code, Act of Feb. 13, 1925, ch. 229, Sec. 1, 43 Stat. 937 (U. S. Code, title 28, Sec. 344), reference to which statement is hereby made.

This court has many times said that it will not dismiss a writ of error (now appeal) unless the federal questions involved are "wholly frivolous" and are "unsubstantial" and are "devoid of all color of merit." (*Chicago R. I. & P. Ry. Co. v. Devine*, 239 U. S. 52; *Hunter v. Pittsburgh*, 307 U. S. 161, 176.) If the federal questions presented "require analysis and exposition" for their decision they withstand a motion to dismiss. Likewise, it is only where the appeal is manifestly taken for delay only, or the questions to be decided are so unsubstantial as not to need argument, that this court will entertain a motion to affirm. (Rule 7, par. 4.)

As pointed out in appellants' Statement as to Jurisdiction on Appeal, the record itself [R. 20-24, 98-126, 157-183], the opinion of the lower court [R. 333], the certificate of the lower court [R. 714] and even the stipulation of counsel [R. 721-2], clearly show that appellants have at all times claimed, in accordance with the local practice and procedure, that the California statute involved, and particularly as construed, applied and sought to be enforced against appellants, is repugnant to the "due process" and "equal protection" clauses of the Fourteenth Amendment and the impairment of contract clause of section 10 of Article I of the United States Constitution in the particulars set forth in their assignment of errors

[R. 676 *et seq.*]. Nor can it be doubted that the validity of said statute against said attacks was upheld, and all of such claims of appellants denied, by the lower court, either expressly or by necessary implication (see subdivs. *C* and *D* of Statement as to Jurisdiction on Appeal, giving definite citations to the record).

Appellants submit that the federal questions raised by the denial of these claims, as set forth in the said assignment of errors but more logically re-stated as set forth in appellants' Statement of Points to Be Relied Upon, are not only not frivolous but are so substantial as to require a *reversal* of the judgment of the lower court.

II.
STATEMENT OF CASE.

This case comes to this court by appeal to review a judgment by the District Court of Appeal of the State of California, Second Appellate District, Second Division, denying appellants' petition for a peremptory writ of prohibition to prevent the Superior Court of Los Angeles County from enforcing a preliminary injunction against appellants, or taking further proceedings against appellants, in an action brought by the state of California on relation of its Director of Natural Resources to enjoin the alleged "unreasonable waste of natural gas" by appellants and others in Santa Fe Springs oil field. The sole authority of said state official to institute the action, and of the Superior Court to entertain the same, is an amendatory statute of that state adopted in 1929 (Stat. 1929, p. 927) prohibiting "the unreasonable waste of natural gas" (Sec. 8b), and providing for the enforcement there-

of by proceedings before the state supervisor of oil and gas and appeal to the District Board of the operators, and suit to enforce the final order (Secs. 8d, 9, 10, 14a) or by direct suit in the Superior Court to enjoin the alleged "unreasonable waste of natural gas" (Sec. 14b) or by criminal proceedings (Sec. 21a). The pertinent parts of the statute, as amended, are printed as Appendix A to the Statement as to Jurisdiction filed herewith. The above sections are printed as Appendix A of the supplement to this brief.

By said petition for writ of prohibition there was drawn in question the validity of said statute, upon the ground that said statute, and particularly as construed, applied and sought to be enforced against appellants by paragraph numbered 3 of said preliminary injunction, is repugnant to the above mentioned clauses of the United States Constitution. [R. 20-27, 98-100, 115-122, 6, 157, 183, 283-286.] The alternative writ of prohibition, requiring appellees to show cause why a peremptory writ of prohibition should not issue, was issued on April 9, 1930 [R. 328], and the judgment denying the peremptory writ of prohibition was rendered on November 29, 1930. [R. 333-363½.] It has not yet been officially reported, but is found at 63 Cal. App. Dec. 1175, and at page 333 of the typewritten record not yet printed. A timely petition for rehearing was denied on December 27, 1930 [R. 364, 486], and a timely petition for a hearing of said cause by the Supreme Court of California was denied on January 26, 1931, on which date the judgment became final. [R. 487, 671½.] The appeal to this court was allowed on January 29, 1931. [R. 692.]

III.

The Case Comes to This Court on an Admitted Statement of Facts.

The allegations of the petition for prohibition [R. 3-29] are admitted to be true by the demurrer thereto [R. 331], which was the only return filed thereto. (*Hevren v. Reed*, 126 Cal. 219.) The granting of a writ of prohibition in California in a proper case is a matter of right *ex debito justitiae*, and is not discretionary.

Haverneyer v. Superior Court, 84 Cal. 327, 401.

The petition for writ of prohibition alleges certain facts which it is also alleged therein *appeared from the uncontradicted evidence introduced in the hearing before the Superior Court.* [R. 7-14.] In addition to this, the petition expressly adopted the allegations and denials of appellants' answer in the Superior Court, and re-alleged the same with the same force and effect as if set forth at length in said petition. [R. 6.] The allegations and denials of said answer [R. 127-185] are thus also admitted by the demurrer.

Since a summary of the uncontradicted and admitted facts is set forth in appellants' "Statement as to Jurisdiction on Appeal" under the subhead "Uncontradicted and Admitted Facts," for the sake of brevity and to avoid repetition the court is respectfully referred thereto.

Where, as here, the facts upon the basis of which Federal rights as asserted are set forth in the pleadings and are admitted by demurrer, this court is not bound by the statements or conclusions of the state court of last resort as to their effect, but will examine the facts as averred

and draw its own inferences as to their ultimate effect. *Truax v. Corrigan*, 257 U. S. 312, and cases therein cited fully establish this. This court will also examine the facts where such inquiry "is essential to the enforcement of a right suitably asserted under the Federal Constitution."

Beidler v. South Carolina Tax Commission, Case No. 2, October Term, 1930, 75 L. Ed. 69, 70.

For these reasons appellants do not agree with the statement in appellees' brief (p. 4) that "The facts of the case are fully and correctly stated in the opinion of the lower court," but earnestly pray that this court (as we believe, under its said decisions, is its duty to do) carefully and thoroughly consider at this point the uncontradicted and admitted facts hereinabove referred to, which are summarized in appellants' "Statement as to Jurisdiction on Appeal" as above stated.

The statement in appellees' brief (p. 9) that "The appellants were at all times wasting to the air in excess of 26,000,000 cubic feet of gas each average day" is not supported by the record. This statement is taken from the allegations of the complaint in the Superior Court alleging that appellants were then permitting to be "blown to the air" that amount of natural gas in the aggregate. [R. 57, Exh. A-A, 43.] These allegations were denied, with certain affirmative allegations relating thereto, in the answer of appellants [R. 139-141], which denials and allegations of the answer were incorporated and re-alleged in the petition for writ of prohibition in the District Court of Appeal [R. 6] and are admitted to be true by the demurrer of appellees thereto. Besides, under the statements of the lower court (as distinguished from the effect

of its action) the statute is not concerned with the amount of gas blown to the air, but only with its proper utilization in the production of oil. [R. 350-1, 363.] The Superior Court made no findings that any of appellants are wasting or unreasonably wasting any natural gas. The undisputed and uncontradicted facts alleged in the petition for writ of prohibition and admitted by the demurrer conclusively show to the contrary [R. 7-14, 6, 127-183], as do appellants' affidavits. [R. 185-263, 275-287.] The only finding which the Superior Court made was the finding "that there appears to be an unreasonable waste of natural gas in the Santa Fe Springs oil *field,*" considering the field as a whole. [R. 296.] This finding, the order shows on its face, was not based upon any consideration of the proper utilization of gas by any of the operators in the field in producing oil or upon any waste or other conduct of one or a portion of the operators injuriously affecting the correlative rights of other owners or operators in the field, but was based solely on the amount of gas blown to the air from the field as a whole. [R. 296.] This gas, that court said, might be conserved by limiting the production of gas from the whole field "to a quantity reasonably in excess of present outlets for beneficial use above ground," which the court then fixed at 285,000,000 cubic feet per day. [R. 296.] The admitted sole purpose of this decrease was to reserve it for the future use of the general consuming public above ground for light, heat and fuel. [R. 23.]

The said provisions of the order itself show, on their face, that this was the purpose of the decrease in the allowed gas production from the field, for they show the allowed gas produced is based solely on the "*present out-*

lets for beneficial use above ground" for light, heat and fuel. The matter of whether any one or more operators are taking an undue portion of oil or gas or doing anything injuriously affecting the rights or operations of others is not taken into account.

The amount of allowed gas production was arbitrarily allocated amongst the different leases or properties in the field on the basis of 1200 cubic feet of gas for each barrel of estimated potential oil production, without any consideration or regard as to whether the particular wells in the field were operating at a proper or improper gas-oil ratio. [R. 295-296, 298 *et seq.*]

The Superior Court then provided that the defendants be enjoined until the further order of the court as follows:

> "1. From blowing, releasing or permitting any natural gas to escape into the air from any well or wells in the Santa Fe Springs Oil Field before the removal of the gasoline from such natural gas.
>
> "2. From operating any well producing natural gas in the Santa Fe Springs Oil Field except while exercising a high degree of care in the selection and adjustment of appliances and in the use thereof for the purpose of keeping each producing well in its 'optimum gas-oil ratio'—the term 'optimum gas-oil ratio' being defined as the smallest number of cubic feet of gas which can be produced with each barrel of oil from the same well at the same time.
>
> "3. From producing more net formation gas on the average day of each seven (7) day period from any lease or other property unit than is set forth in the 'Allowed Gas Production' column in the schedule following:" [R. 297 *et seq.*]

It is the construction and application of the statute in paragraph 3, which was, on its face, based solely upon the *"present gas outlets for beneficial use above ground" for*

light, heat and fuel, and limited the gas *production* of appellants, and others in the field, by so greatly decreasing the same, *solely "for the purpose of conserving such natural gas for the benefit of the general public,"* that appellants particularly challege under the Federal Constitution.

Without attempting to review or summarize the uncontradicted and admitted facts alleged in the petition and admitted by the demurrer thereto, which are summarized in appellants' "Statement as to Jurisdiction on Appeal," to which we have referred the court, we wish at this point to stress and particularly call the court's attention to the following:

IV.

Admitted Facts Which Were Established by the Uncontradicted Evidence in the Superior Court.

No natural gas is being produced by any of appellants from any oil well or wells in said oil field in any quantity exceeding a reasonable proportion to the amount of oil produced therefrom, or in a quantity more than is reasonably or necessarily required in the production of oil therefrom in accordance with efficient methods and appliances. [R. 8, 12.] *Each of the wells of appellants in said field is efficiently operated, and is so operated that it does not injuriously affect the operations of others owning and/or operating wells in said field.* [R. 13.] The gas-oil ratio of each well producing oil and gas is a fair index to the efficiency of such well in the proper utilization of natural gas in the production of oil, and *the gas-oil ratio of the wells of appellants is the third lowest amongst the nine largest producers of oil in said field.* [R. 13.]

Each of their said wells was drilled and equipped in accordance with the best known methods, appliances and equipment, and each of them has been and is equipped with casings of sufficient strength, all safety devices that are necessary, all in accordance with the highest skill and best methods known to the industry. Each of said wells has been so drilled, completed and operated, and is so operated, as to prevent, as far as possible, damage to underground petroleum and gas deposits from infiltrating water and other causes and loss of petroleum and/or natural gas, and so as not to interfere with, injure or damage the interests or rights of neighboring property owners, lessees or operators. [R. 6, 155-156.]

At the time of the preliminary injunction appellants were producing 19,554 barrels of oil per day, and the amount of gas reasonably required to be *utilized* to flow and lift that amount of oil to and out of the wells was 57,120,000 cubic feet per day under the most efficient methods, as aforesaid. [R. 10-11.] The market value of said daily oil production was $31,286.40. In addition to this most valuable, reasonable and efficient *utilization* of their natural gas production in producing said quantity and value of oil, said natural gas so utilized was and is *utilized* a *second* time in the manufacture of casinghead gasoline of the approximate value of $3,000.00 per day. [R. 12.] The greater part of the resulting dry natural gas which remained was further utilized a *third* time for fuel, field and other purposes in the operations of appellants, and so much as could be sold was sold [R. 12] at the prevailing price of 5¢ per thousand cubic feet. [R. 19.] There was and is no further available means to any of appellants for any further utilization of

the remaining residual dry gas (amounting to less than 40% of its production and which had already been twice used for highly beneficial purposes), and it had and has no market value [R. 12]; and, notwithstanding diligent efforts so to do, none of appellants was able to sell or even give it away. [R. 12.] Gas must be used as produced, and cannot be stored except at a prohibitive cost. [R. 154-156, 6.] By reason of these premises, appellants are compelled, after making the aforesaid manifold utilizations thereof, to release and permit the remaining residual dry gas to escape into the air. [R. 12-13.]

Notwithstanding these admitted facts established by uncontradicted evidence [R. 7-14], the Superior Court, on March 19, 1930, acting under the supposed authority of the statute under review "*and for the sole purpose of conserving such natural gas for the benefit of the general public*" [R. 23], made its injunctive order by the terms of which appellants were required to curtail their production of gas from 57,120,000 to 27,187,000 cubic feet per day. [R. 16, 268, 309.] This latter amount is only approximately 48% of the gas required to produce the amount of oil which appellants were then producing in operating their wells efficiently at their optimum gas-oil ratios, which were amongst the lowest in the field, and so as not to injuriously affect the operations of others owning and/or operating wells in said field. The order of March 28, 1930, modifying the preliminary injunction to provide for new wells coming in since the original order, did not substantially change the allowed gas production to appellants, which was slightly increased to 28,160,000 cubic feet per day. [R. 16, and schedule at R. 18.]

The amount of oil which appellants can produce with the allowed gas production under the order as modified does not exceed 10.211 barrels per day, which requires the shutting in and killing of many wells (of the average cost of $150,000.00 each), resulting in serious, permanent and irreparable injury. [R. 13-15.] This was demonstrated by appellants' *bona fide* attempt to comply with the order before instituting the prohibition proceedings. [R. 16-19.] The decrease in the value of appellants' daily oil production alone under the order as modified amounts to approximately $12,500.00 per day, to say nothing of permanent injury and damage to its wells pinched back, shut in and killed, and the loss in value of casinghead gasoline manufactured from its gas production, whereas the remaining residual natural gas blown to the air by appellants and remaining after its manifold and most beneficial utilizations, as foresaid, had no value and cannot be sold or even given away. As already stated, it was admittedly produced without injuriously affecting the other operators and/or owners in the field. If a market could have been found therefor at the prevailing price, the value would not have exceeded $1,300.00 per day, a ratio of about 1 to 10, compared to appellants' loss of $12,500.00 per day in oil alone. Since this gas had no further use or actual value, the disproportion is as "nothing" is to $12,500. All of this decrease in the allowed gas production and resulting loss and permanent and irreparable injury, the demurrer admits, was solely "for the purpose of conserving such natural gas for the benefit of the general public" [R. 23], and without any compensation or recourse whatsoever to appellants therefor.

Appellees (wandering outside of the record) have included in their brief and in the supplement thereto various semi-official and private reports which are not within the judicial knowledge of this court. It is submitted that the particular facts upon the basis of which this case is to be decided are those alleged in the petition for writ of prohibition, [R. 3-29, 127-185, 6 par. 4] which are admitted by the demurrer. There are no material facts of which this court can properly take judicial knowledge set forth by appellees which are in conflict with the admitted facts alleged in the said petition. The allegations and denials of the answer which are incorporated in said petition [R. 6], and are admitted by the demurrer, show the very limited extent to which the general consuming public is dependent upon natural gas produced in Santa Fe Springs [R. 144-151], the favorable comparison in low cost and fuel value of the fuel oil, artificial gas, hydro-electric and steam-generated electric energy extensively used in competition with natural gas in Southern California, [R. 145-6]; and also that the opening of a well into any oil and gas zone in said field does not disturb or reduce the pressure of the gas in all parts of the zone but only in the immediate vicinity of the well [R. 6, 136, 153].

The general technical data in Report III of the Federal Oil Conservation Board, printed in the Supplement to Appellees' Brief (pp. 70-71, 76-77) of which appellees ask this court to take judicial notice, show that due to the variations in thickness, compactness, texture and porosity of the so-called oil sands (which in reality are like rock), in the character of gas and oil, in gas pressure, and many

other factors, a study of each individual well is necessary; also that the gas-oil ratio is a working index of the efficiency of any well, *i. e.,* the production of "the greatest amount of oil with the minimum expenditure of gas energy." In this connection at pages 51, 56 and 59 of "Function of Natural Gas in the Production of Oil," by H. C. Miller, Senior Petroleum Engineer, U. S. Bureau of Mines; (a report of said Bureau in cooperation with the Division of Development and Production of the American Petroleum Institute) it is said that theoretically, and in the opinion of operators generally, the largest ultimate recovery of oil from the ground is obtained by close spacing and rapid drilling of wells. The table on page 59 shows 60% to 100% greater ultimate recovery of oil per acre. Such practice takes the oil more nearly from the place where Nature stored it, thus requiring less gas energy to move it to the well and leaving less oil adhering in the minute interstices of the producing compact formation.

In fact, this formation in Santa Fe Springs is so compact that when a well penetrates the formation the release of the oil and gas held in solution under great pressure does not affect the pressure throughout the field, but only in the immediate vicinity of the well [R. 6, 152-153] within a radius of 50 to 100 feet. [R. 277.] The Supreme Court of California took judicial notice that generally the maximum drainage area would not exceed four or five acres. (*Chandler v. Hart,* 161 Cal. 405, 418.) Scientific knowledge of underground conditions under which oil and gas exist has increased so greatly since the time of the *Ohio Oil Co.* case and the earlier cases, that it is now generally recognized that such deposits in their

original state in an undrilled field are stationary and that there is no lateral movement; also that the extent of the drainage of oil and gas is not great and varies somewhat, depending on the gas pressure, the porosity of the formation, the viscosity of the oil, and many other factors, and that these substances do not percolate freely underground.

See:

Mills and Willingham on Oil and Gas, pp. 18 and 26;

Chandler v. Hart, 161 Cal. 405, 418;

Bodcaw Lumber Co. v. Goode (Ark.), 254 S. W. 345, 29 A. L. R. 518;

Osborn v. Arkansas etc. Oil & Gas Co., 103 Ark. 175

If this court can take judicial notice of the statements in Appendices D, E, F, G and H, it can and should read the entire documents and not merely isolated extracts, and should also read the scientific facts in the report to the Superior Court presented on the witness stand by Dr. Stanley C. Herold, of Stanford University, who was called by opposing counsel as a qualified geologist (printed as Appendix B of Supplement), and the technical data in the affidavits. [R. 205-263.]

The general increase in the use and need of natural gas by the public generally is far less than the current supply in California incidental to the efficient production of oil and far less than opposing counsel contend [Supplement to Appellees' Brief, p. 36; R. 144-151, 242-263.] The increase in the demand therefor in some areas is immaterial, for, assuming the importance to the consuming general public of natural gas for light, heat and fuel, as

against fuel oil, artificial gas, coal, electric energy, etc., and assuming that "the public are warranted in having a feeling of concern" in respect to the continued maintenance of the supply and of the business of producing same, still this does not mean that such business or the property involved is "affected with a public interest" (*Williams v. Standard Oil Company*, 278 U. S. 235, 240) or justify the state through any of its departments in depriving the owners of the present use thereof without compensation for the purpose of reserving the same in the ground for the future use and benefit of the general public.

Pennsylvania Coal Company v. Mahon, 260 U. S. 393;

West v. Kansas Natural Gas Co., 221 U. S. 229, and other cases hereinafter cited.

In order to avoid repetition, the opinion of the District Court of Appeal in the case at bar, and the two later opinions of the Supreme Court of California in *People v. Associated Oil Company* [set forth in Appendices B and C in the Supplement to Appellees' Brief] will be discussed during the course of the argument and particularly under Point G. The latter two opinions did not involve appellants—contrary to what might be inferred from appellees' brief (p. 4).

V.
ARGUMENT.

SUMMARY OF THE ARGUMENT.

POINT A.

Prohibition Is Appellants' Proper Remedy.

The conclusion of the lower court that the Federal questions involved were properly raised by prohibition is conclusive, and is also in accord with previous decisions of this court. A state may not by any of its agencies, including its judicial branch, disregard or act in violation of the prohibitions of the Fourteenth Amendment.

POINT B.

The Validity of the State Statute Involved Under the Federal Constitution Is to Be Determined By Its Operation and Effect as Applied to Appellants, and Appeal Rather Than Certiorari Is the Proper Remedy.

POINT C.

The Facts Being Admitted by Demurrer and an Inquiry Thereof Being Essential to the Enforcement of the Federal Rights Asserted, This Court Will Examine Same and Draw Its Own Conclusions.

POINT D.

Legislation Not Limited to the Regulation of Private Correlative Rights in a Common Source of Supply of Oil or Gas by Preventing Waste or Other Conduct by One or More of Them Which Injuriously Affects the Correlative Rights of Others in the Common Source of Supply But Which Is Directed to the Curtailment of Production Itself or to Commercial Conservation for the Benefit of the Consuming General Public, Is Repugnant to the "Due Process" Clause of the Fourteenth Amendment.

POINT E.

The Statute as Applied to Appellants Constitutes a Taking of Appellants' Property for a Public Use Without Compensation and Without Due Process of Law, in Violation of the Fourteenth Amendment.

POINT F.

Under the Admitted Facts, the Extent of the Invasion of Appellants' Property Rights Is So Great, So Arbitrary, So Oppressive and Unreasonable, That It Goes Too Far Under the Police Power of the State.

POINT G.

The Statute Involved Is Void for Uncertainty and Lack of a Sufficiently Definite Standard of Conduct Under the Due Process Clause of the Fourteenth Amendment.

POINT H.

The "Prima Facie Evidence" Clause of the Statute Violates the "Due Process" Clause of the Fourteenth Amendment.

POINT I.

The Statute Involved, as Applied to Appellants, Unconstitutionally Impairs Appellants' Lease Contracts.

POINT J.

The Statute Involved, as Applied to Appellants, Denies to Appellants the Equal Protection of the Laws.

POINT K.

If Appeal Was Improvidently Sought and Allowed, Then Certiorari Should Be Granted Upon the Papers Whereon the Appeal Was Allowed.

POINT A.

Prohibition Is Appellants' Proper Remedy.

The lower court did not hold that prohibition is not appellants' remedy. On the contrary the lower court held that prohibition is the proper remedy to question the con-

stitutionality of the order of the Superior Court applying the statute involved to appellants, and that the federal questions raised in the petition for writ of prohibition were properly raised by writ of prohibition and went to the point that the Superior Court was acting in excess of its jurisdiction, for it proceeded, without questioning the procedure, to decide the federal question of whether the statute was void under the due process clause of the Federal Constitution for lack of a sufficiently definite standard or measure of what is prohibited by the prohibition against the "unreasonable waste of natural gas" [R. 336-357], and also the federal question of whether the statute as construed and applied against appellants operated to take appellants' property for a public use without compensation and without due process of law in violation of the Fourteenth Amendment. [R. 357-361.]

This being true, the *issue* of whether these federal *questions* which were expressly or necessarily passed upon by the judgment of the lower court were properly raised by the writ of prohibition proceedings, is not open to appellees in this court. In *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 257, this court said that where

> "the highest court of the state either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right, the decisions of this court render it clear that it is our duty to pass upon the merits of the Federal question."

It is enough to say that the lower court treated the federal questions as open and decided them (*Home Ins. Co. v. Dick*, 281 U. S. 397, 407; *Hill v. Smith*, 260 U. S. 592, 594; *Rogers v. Hennepin*, 240 U. S. 184, 188.) A

non-federal ground (if such it be) which might have been considered by the state court, but was not, or, which is inseparably interwoven with a Federal question, or which does not have a fair or substantial basis, is of no consequence and cannot be raised in this court to defeat its jurisdiction.

Grayson v. Harris, 267 U. S. 352, 358;

Abie State Bank v. Bryan, No. 63, Oct. Term 1930, 75 L. Ed. 420, 424;

Enterprise Irr. Dist. v. Farmers Canal Co., 243 U. S. 157;

Broad R. P. Co. v. So. Carolina, 281 U. S. 537.

In truth, the lower court was correct in assuming that prohibition is appellants' proper remedy. Many California decisions establish the rule that *a court which is proceeding in violation of the express or implied mandate of a constitution or statute, or which grants to or takes away from a party rights which a constitution or statute expressly or impliedly provides shall not be granted or taken away, is exceeding its jurisdiction, even though it otherwise has jurisdiction of the subject matter and the parties, and prohibition is the proper remedy.* Such action constitutes more than mere error in the exercise of jurisdiction, for, under the authorities, the court thereby exceeds its jurisdiction. (*Jacobsen v. Superior Court,* 192 Cal. 319, 330-2; *Baar v. Smith,* 201 Cal. 87, 100-102; *McClatchy v. Superior Court,* 119 Cal. 413, 420; *Toningsen v. Odd Fellows' Cem. Assn.,* 60 Cal. App. 568; *Weintraub v. Superior Court,* 91 Cal. App. 763; *Ambassador Petroleum Co. v. Superior Court.* 208 Cal. 667, 671; *Long v. Superior Court,* 102 Cal. 449, 453, 455.)

Many other cases might be cited. In the second and last of these cases the trial court granted "too much" relief. The *Jacobsen* case involved a *preliminary injunction* in a suit in equity over which the court had jurisdiction of the parties and the subject matter, but which was held to be in excess of its jurisdiction and not mere error, in that it deprived the defendant of his property for public use without just compensation and without due process of law. The similarity to this case is great; the case is almost on all fours. The court also held that the remedy by appeal or *supersedeas* under facts (192 Cal. 330) almost identical to those alleged in the case at bar [R. 25-27] did not afford a plain, speedy or adequate remedy. (192 Cal. 330.)

The granting of a writ of prohibition to a party injuriously affected bringing himself clearly within the law is not discretionary with the court but a matter of right *ex debito justitiae.*

Havemeyer v. Superior Court, 84 Cal. 327, 401.

That the federal questions involved were properly raised by a writ of prohibition is also in accord with the previous decisions of this court (*Mt. Vernon-Woodberry etc. Co. v. Alabama I. P. Co.,* 240 U. S. 30, 31-32), where this court refused to dismiss a writ of error from a judgment of the highest court of Alabama denying a writ of prohibition to prevent a court from proceeding to enforce a state statute authorizing condemnation proceedings which it was alleged contravened the Fourteenth Amendment in that the purpose of the condemnation was not a public one.

See, also:

Missouri v. Taylor, 266 U. S. 200;

Pacific Gas & Electric Co. v. Police Court, 251 U. S. 22;

Weston v. Charleston, 2 Pet. 449;

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234-236;

Napa Valley Electric Co. v. Railroad Commission, 251 U. S. 366;

New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 65;

Ex parte Yarbrough, 110 U. S. 651.

The Fourteenth Amendment and the other provisions of the Federal Constitution invoked by appellants are directed to state action by its legislative, executive or *judicial* branches. (*Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U. S. 673; *Home Teleph. & Teleg. Co. v. Los Angeles,* 227 U. S. 278; *Scott v. McNeal,* 154 U. S. 34; *Ex parte Virginia,* 100 U. S. 339, 346-347.) These constitutional provisions not only grant rights to the parties litigant which it is the *duty* of state courts to enforce, but are directed to state action through its judicial branch, the mandate of which that branch has no *power* to ignore. (See above California and federal citations.) To hold otherwise would put the state court above the Federal Constitution. No state can give to its courts power to violate the Federal Constitution. (*Pennsylvania R. Co. v. Public Service Commission,* 250 U. S. 566.) This prohibition against judicial action by a state court is even stronger than when imposed by a state statute or constitution. Under the decisions above cited it makes no

difference if the state court be sitting as a court of equity, or if the order in violation of the mandate of the Federal Constitution be a preliminary injunction. (*Jacobsen v. Superior Court, supra.*) In fact, the sole authority of the Superior Court was derived from the statute. [R. 363, p. 22 of Supplement to Appellees' Brief.]

The preliminary injunction invading appellants' asserted federal rights was just as disastrous as, and for all practical purposes is, a final injunction. "The substance and not the shadow determines the validity of the exercise of the power." (*Postal Tel. etc. Co. v. Adams,* 155 U. S. 689, 698, 39 L. Ed. 311, 316.) Though the court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments; there must be jurisdiction to give the judgment rendered, as well as to hear and determine the case. A state court has no power to enforce an unconstitutional statute or to render or enforce a judgment in violation of the Constitution under the admitted facts. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert judicial action into due process of law if the necessary result be to deprive him of his property without compensation.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234-236;

Windsor v. McVeigh, 93 U. S. 274, 282;

Ex parte Reed, 100 U. S. 13;

Jacobsen v. Superior Court, 192 Cal. 319, and other cases above cited, and cases therein referred to.

Since, therefore, the lower court not only correctly assumed that the federal questions hereinafter discussed were properly before it for decision, and actually decided them, but also because such federal questions presented on this appeal were necessarily involved, and were controlling in its decision, this court's jurisdiction is complete. (*Grubb v. Public Utilities Commission,* 281 U. S. 470, 477-8, and cases above cited.) The lower court, in reaching its decision that the Superior Court had "jurisdiction to determine what is an unreasonable waste" of natural gas, actually decided, and also had to decide, (a) the federal question presented on this appeal, whether the statutory prohibition against "unreasonable waste of natural gas" is uncertain and devoid of a sufficient standard or measure of the conduct to satisfy the due process clause of the Fourteenth Amendment; and (b) the other federal questions presented on this appeal, *viz.*: whether under the admitted facts presented in the petition for writ of prohibition the statute, particularly as construed and applied and sought to be enforced against appellants, is in conflict with specific clauses of the Federal Constitution and whether the lower court properly denied the rights asserted by appellants thereunder. These Federal questions were inseparably interwoven with the question of the court's jurisdiction, and were expressly decided as to most of them, and as to the others, were necessarily decided, by the lower court, in denying the peremptory writ of prohibition. Appellants are therefore entitled to have the Federal questions presented decided by this court on their merits.

POINT B.

The Validity of the State Statute Involved Under the Federal Constitution Is to Be Determined by Its Operation and Effect as Applied to Appellants, and Appeal Rather Than Certiorari Is the Proper Remedy.

"When a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor upon its declared purpose, but rather upon its operation and effect as applied and enforced by the state; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court." (*Coppage v. Kansas*, 236 U. S. 1, 14-15, 59 L. Ed. 441, 446; *Corn Products Refining Co. v. Eddy*, 249 U. S. 427, 63 L. Ed. 689; *Louisiana R. & Nav. Co. v. Behrman*, 235 U. S. 164, 171, 59 L. Ed. 175.) In the case last cited this court said that in determining what effect has been given to a statute

> "This court is not limited to the mere consideration of the language of the opinion of the state court" (p. 171).

A decision of the highest court of the state against the contention that the operation of the state statute involved as construed and applied to an appellant is to deprive him of his property without due process of law, involves a federal question properly raised by appeal rather than by *certiorari*. (*Darling v. Newport News*, 249 U. S. 540, 63 L. Ed. 79; *Merchants Nat'l Bank v. Richmond*, 256 U. S. 635, 65 L. Ed. 1135.) This is also true if the necessary effect of the judgment is to deny

a federal right claimed, even though the ruling be not put upon that ground.

New York ex rel Bryant v. Zimmerman, 278 U. S. 63, 67, 73 L. Ed. 184, 187.

POINT C.

The Facts Being Admitted by Demurrer and an Inquiry Thereof Being Essential to the Enforcement of the Federal Rights Asserted, This Court Will Examine Same and Draw Its Own Conclusions.

This court on writ of error to or appeal from the state court, in a case where the issue is whether a state statute in its application to facts which are set out in the pleadings and are admitted by the demurrer violates the Constitution, must examine and analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the highest state court in this regard.

Truax v. Corrigan, 257 U. S. 312, 324-325, and cases there cited;

Merchants National Bank v. Richmond, 256 U. S. 635, 638.

It is the duty of this court on appeal or writ of error proceedings to a state court to inquire into the facts where such inquiry is essential to the enforcement of a right suitably asserted under the Federal Constitution (*Beidler v. South Carolina Tax Commission*, Advance Opinions, Case No. 2, Oct. Term 1930, 75 L. Ed. 69, 70, and cases there cited), or where it is claimed that a federal right set up has been wrongly denied and in which the state court has put its decision on a finding that the asserted

federal right has no basis in point of fact, or when the conclusion of law and findings of fact are so intermingled as to make inquiry necessary, in order to pass upon the federal question involved (*Truax v. Corrigan, supra*), or where there is ground for the insistence that a federal right has been denied as the result of a finding that is without support in the evidence. (*Union Pacific R. Co. v. Public Service Commission,* 248 U. S. 67, 69; *Interstate Amusement Co. v. Albert,* 239 U. S. 560.) When the basis of facts upon which the state court rests its decision denying the asserted federal right has no support in the record, it is the duty of this court to review and correct the error.

Postal Tel Cable Co. v. Newport, 247 U. S. 464;
Ancient Egyptian Arabic Order v. Michaux, 279 U. S. 737, 745-746.

POINT D.

Legislation Not Limited to the Regulation of Private Correlative Rights in a Common Source of Supply of Oil or Gas by Preventing Waste or Other Conduct by One or More of Them Which Injuriously Affects the Correlative Rights of Others in the Common Source of Supply but Which Is Directed to the Curtailment of Production Itself or to Commercial Conservation for the Benefit of the Consuming General Public, Is Repugnant to the "Due Process" Clause of the Fourteenth Amendment.

The foregoing proposition, we submit, is fully established by the previous decisions of this court.

Ohio Oil Company v. Indiana, 177 U. S. 190;
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 73-77;

West v. Kansas Nat. Gas Co., 221 U. S. 229, 246;
Bacon v. Walker, 204 U. S. 311;
Walls v. Midland Carbon Co., 254 U. S. 300.

Ohio Oil Company v. Indiana, supra, the leading case on the basis of the legislative power, arose on writ of error to the Supreme Court of Indiana to review a decision affirming a judgment sustaining a statute of that state which made it unlawful for the owner of any gas or oil well to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined in such well or proper pipes or other safe receptacle, for a longer period than two days next after the gas or oil shall have been struck in such well. An examination of the decision of the Supreme Court of Indiana in this case, as well as *Townsend v. State,* 147 Ind. 624, 49 N. E. 14 (upon which this court said the state court rested its decision), shows that the immense importance of natural gas to the people of Indiana was stressed. So the state court *held that the purpose of the statute was to conserve this natural resource for the people of the state,* and declared the extraordinary rule that there was an absolute analogy between oil and gas and wild animals and fish, and that before the substance was reduced to possession the state in its sovereign capacity was the proprietor, which theory would make the power of regulation by the state unlimited even to the point of an absolute prohibition against reducing the same to possession. (*Geer v. Connecticut,* 161 U. S. 519, 525.) The notion of correlative rights and obligations between owners in the same pool was completely ignored, the state court ground-

ing its decision squarely on the proposition that the statute was designed to promote the *public* welfare. The court concluded its opinion by saying: "We therefore conclude that the facts stated in the complaint make it a case of a *public nuisance,* which the appellant has a right to have abated by injunction." In short, the state court took the view that the statute concerned *public* and not *private* rights.

This court, however, in sustaining the statute, upheld it upon the state's power to regulate the private correlative rights of owners in the same field, and not upon the ground of public welfare. The decision of this court stands in direct opposition to the holding of the Indiana court and completely repudiates the position of the Supreme Court of Indiana, that the basis of the legislative power is to protect public rather than private rights. This court, after examining Indiana decisions and pointing out the minority rule of property which exists in that state on the subject of oil and natural gas, and stating that while there was an *analogy* between animals *ferae naturae* and mineral deposits of oil and gas, there is no *identity* between them, said:

> "* * * In things *ferae naturae* all are endowed with the power of seeking to reduce a portion of the *public property* to the domain of private ownership by reducing them to possession. *In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field.* This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No devesting of private

property under such a condition can be conceived, because the public are the owners, and the enacting by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character. *Geer v. Connecticut*, 161 U. S. 519, 525, 40 L. Ed. 793, 795, 16 Sup. Ct. Rep. 600. *On the other hand, as to gas and oil the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property.* But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, or by *waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power,* from the peculiar nature of the right and the objects upon which it is to be exerted, *can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. * * * Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners,* the law of the state of Indiana which is here attacked because it is asserted that it devested private property without due compensation, in substance, is *a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others.*" (Italics ours.)

177 U. S. 190, 209-210.

From the clear statement of this court there can be no doubt but that *the basis for the legislative power is the*

protection of the private correlative rights of the surface owners in a common source of supply by preventing waste or other conduct by one or more of them which injuriously affected the private correlative rights of others in the same field; that no right exists in the public to the oil and gas in such field, but title thereto "is vested only in the owners in fee of the surface of the earth within the area of the gas field: that they could not be deprived thereof" without a taking of private property. From these conclusions the proposition above stated as *Point D* of this brief necessarily follows and is fully established.

The decision of this court in *West v. Kansas Nat. Gas Co., supra,* eliminates any possible doubt which might exist on the subject. In that case a statute of Oklahoma prohibiting the construction of pipelines for natural gas for the transportation of such gas by such lines, except by domestic corporations whose charters shall provide that the gas shall be only transported between points in the state and containing other provisions designed to conserve deposits of natural gas within the state for the future benefit and welfare of the citizens of that state, was held unconstitutional not only because it unconstitutionally interfered with interstate commerce, but *also because of its interference with private property, which this court said could not be justified as an exercise of the police power of the state to conserve its natural resources.* This court placed its decision on *both* grounds. The state alleged and stressed the limited supply of natural gas, the dependence of the people of the state, both present and future, thereon for fuel, the lack of other fuel, and the dependence of the future growth and prosperity of the state thereon. (221 U. S. 245-8.) The

state's attorney general asserted that the statute's "ruling principle is conservation, not commerce; that the due process clause is the single issue;" that the statute was a proper regulation under the police power *to conserve the natural resources of the state for the use of the inhabitants of the state* (pp. 249-250).

We quote briefly from the opinion:

"* * * With full appreciation of the importance of the questions involved, we pass to their consideration.

"As to conservation, appellant says that 'the case narrows itself to the single question of *whether, in any event, a state has the right to conserve its natural resources;* and, *second, has it the right to preserve a common supply for the equal use of all those who may by law resort to it.*'

"The second question is not presented in the case. * * * The right of the state 'to preserve the common supply for the equal use of all' owners is not denied by appellees. We put the question out of consideration, therefore, except incidentally, and concede the right of the state to preserve the supply of gas, as we shall hereafter set forth.

"*The extent of power which the second question implies a state possesses challenges serious inquiry. The natural resources of a state may be other than natural gas;* for example, may be timber and coal and iron and other metals; but it is contended that the right of conservation extends to these, and *the broad statement of the first question is qualified in the argument by the properties of natural gas and the limitation of its supply. This, it is contended, gives a range to the police power of the state which otherwise it would not possess.* * * * *Indeed, analogies are adduced of limitations upon the use of property by virtue of the police power under conditions which invoke its exercise for the advancement of the general welfare.* We select for review from the cases brought forward, those nearest to our inquiry, which

are Ohio Oil Co. v. Indiana, 177 U. S. 190; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61; Hudson County Water Co. v. McCarter, 209 U. S. 349."
(221 U. S. 245, 251-252. Italics ours.)

This court, after quoting various extracts from its opinion in *Ohio Oil Co. v. Indiana,* in harmony with our contentions above stated, and referring to the asserted extent of the police power under conditions which invoke its exercise to conserve natural resources privately owned "for the advancement of the general welfare," said:

"The case, therefore, is an authority against, not in support of, the contention of the appellant in the case at bar.

"The statute of Indiana was directed against waste of the gas, and was *sustained because it protected the use of all the surface owners against the waste of any.* The statute was one of *true conservation,* securing the rights of property, not impairing them. * * * *It was sustained because such was its purpose; and we said that the surface owners of the soil, owners of the gas as well, could not be deprived of the right to reduce it to possession without the taking of private property.* It surely cannot need argument to show that if they could not be deprived of the right to reduce the gas to possession, they could not be deprived of any right which attached to it when in possession.

"The Oklahoma statute far transcends the Indiana statute. It does what this court took pains to show that the Indiana statute did not do. It does not protect the rights of all surface owners against the abuses of any. It does not alone regulate the right of the reduction to possession of the gas, but, when the right is exercised, when the gas becomes property, takes from it the attributes of property,—the right to dispose of it; indeed, selects its market, to reserve it for future purchasers and use within the state, on the ground that the welfare of the state

> *will thereby be subserved.* The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. * * * *In other words, the purpose of its conservation is in a sense commercial,—the business welfare of the state, as coal might be, or timber.* Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state." (221 U. S. 245, 251-252, 254-255. Italics ours.)

After reviewing the other cases cited, including *Lindsley v. Natural Carbonic Gas Co., supra,* which this court said was sustained "upon the reasoning" of the *Ohio Oil Co.* case, this court concluded:

> "We have reviewed the cases at some length, as they demonstrate the unsoundness of the contention of appellant based upon the right to conserve (we use this word in the sense appellant uses it) the resources of the state, and that *the statute finds no justification in such purpose for its interference with private property* or its restraint upon interstate commerce." (221 U. S. 260. Italics ours.)

The quotation in appellees' brief (pp. 17-18) from *Bacon v. Walker,* 204 U. S. 311, 313-315, is in no way inconsistent with the reference of this court to that case in *West v. Kansas Natural Gas Co., supra.* In *Bacon v. Walker* this court merely held that where private rights in property are equal or overlap, legislation designed to regulate the same, and to accommodate their co-existence, so that no one or more of them might injuriously affect the rights of others, is proper. This is the principle or

basis of the legislative power for which we contend. As that case, however, related to the accommodation of sheep herders and cattle grazers on the *public domain,* the statute might have entirely prohibited both from using the same.

The case of *Walls v. Midland Carbon Co.,* 254 U. S. 300, from which appellees quote, is not inconsistent with the principle laid down by this court in the *Ohio Oil Co.* case or in *West v. Kansas Natural Gas Co.* It also is against, and does not support, appellee's claim that the state's legislative power extends also to conserving natural resources privately owned for the benefit of the people of the state as well as to regulating and protecting the private correlative rights of the surface owners so that no one or more may injuriously affect the rights of the others. The *Walls* case upheld a state statute of Wyoming regulating the use of natural gas, which declared that

> " 'The use, consumption or burning of natural gas taken or drawn from any natural gas well or wells, or borings from which natural gas is produced for the products where such natural gas is burned, consumed or otherwise wasted without the heat therein contained being fully and actually applied and utilized for other manufacturing purposes or domestic purposes is hereby declared to be a wasteful and extravagant use of natural gas and shall be unlawful when such gas well or source of supply is located within 10 miles of any incorporated town or industrial plant.' "—254 U. S. 300, 309.

Section 2 of the Act prohibited the owner or lessee of a well to sell or dispose of the gas except under the specified conditions for the purpose of manufacturing carbon or

other resulting products. This statute related only to natural gas wells. *It appeared from the record that complainant was taking an excessive and disproportionate amount of the natural gas from the field, so that the gas in the field was being depleted and would be entirely exhausted within a short time, so that the rights of other owners and producers in the field who were engaged in the business of supplying natural gas to various communities would be injuriously affected and wiped out within a year.* Complainant was securing only 1¾ pounds of carbon black and 2/10 of a gallon of high-gravity gasolene from each thousand cubic feet of natural gas, and hence the court said "there is great disproportion between the gas and the product" (p. 324). This court said:

> "* * * The determining consideration is the power of the state over, and its regulation of, a property in which others besides the companies may have rights, and in which the state has an interest *to adjust and preserve*, natural gas being one of the resources of the state. *And in this consideration it is more important to consider not for what a particular owner uses the gas, but the proportion of his use to that of others; or, it may be, the prevention of use by others.*"—254 U. S. 319.

It is to be noted that the interest of the state is in *adjusting and preserving the correlative private rights of the owners in the field,* and this is the whole extent of the power and of what this court held. Expressing the same idea, this court, referring to *Bacon v. Walker, supra,* said:

> "The case, and those it cites, are authority for the position that *a state may consider the relation of rights, and accommodate their coexistence,* and, *in the interest of the community, limit one that others may be enjoyed.*"

Referring, then, to *Ohio Oil Co. v. Indiana, supra,* the opinion proceeds:

> "* * * It was decided * * * the state may interpose its power to prevent a waste or disproportionate use of either oil or gas by a particular owner in order to conserve the equal right of other owners and [thereby] advance the public interest. * * * *It was hence decided that the power of the state 'can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste.'* "—254 U. S. 317.

An examination of the context of the opinion will readily disclose that the statements in the isolated extracts from pages 323 and 324 of the opinion, quoted on page 20 of appellees' brief, were not intended to mean (as appellees seek to infer) that the natural gas in the field is the property "of the state," or that the people of the state have the right of "equal participation" therein. On the contrary, the context of the opinion and the foregoing extracts therefrom herein quoted disclose that it is the property of the surface owners who alone have the right of "equal participation" therein, and that the sole basis of the legislative power and interest of the state, is to adjust and preserve the private correlative rights of the surface owners in a common source of supply by preventing a disproportionate use or waste or other conduct by one or more of them which injuriously affects the private correlative rights of other surface owners in the common source of supply.

This being the extent of the state's legislative power, if the statute goes further than is required for this pur-

pose, and attempts through its legislative or judicial branch to deprive all the surface owners or one or more of them of the use and enjoyment of their property or to prohibit conduct by one or more owners or operators not injurious to the rights of other owners or operators in the same field,—it exceeds the limits of the state's power of regulation, and goes "too far," and it constitutes a "taking" of private property in violation of the due process clause of the Fourteenth Amendment (*West v. Kansas Natural Gas Co., supra: Penn. Coal Co. v. Mahon,* 260 U. S. 393, 413-416; *Buchanan v. Warley,* 245 U. S. 60; *Minnesota v. Barber,* 136 U. S. 313; *Hernanghaus v. So. Cal. Edison Co.,* 200 Cal. 81, 107, 112, 115-118—on certiorari, 274 U. S. 728, 275 U. S. 486-487; *Hathorn v. Natural Carbonic Gas Co.,* 194 N. Y. 326; *Ex parte Kelso,* 147 Cal. 609.)

Neither the oil nor the gas produced in Santa Fe Springs field has been dedicated to a public use. If any such gas had been furnished to a public utility, this would not make the producer a public utility (*Allen v. Railroad Com.,* 179 Cal. 68; *Marin County v. Town of Sausalito,* 168 Cal. 587; *Associated Pipe Line Co. v. Railroad Com.,* 176 Cal. 518; *Beasley v. Engstrom,* 31 Idaho 14, 16 Pac. 1145). But appellants have not supplied any such utility with gas. [R. 161.] Moreover, *the business of producing oil or gas is not affected with a public interest* (*Williams v. Standard Oil Co.,* 278 U. S. 235, 240; *Tyson & Bro. v. Banton,* 273 U. S. 418). In the *Tyson* case the court said:

> "A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect

> of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business."—273 U. S. 430.

In the *Williams* case, *supra,* the court said that the fact "that gasoline is of wide-spread use; that enormous quantities of it are sold in the state of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the state" did not make the business of dealing in it "affected with a public interest" (278 U. S. 240).

These cases also show that the legislative declaration of the public interest such as is found in sections 8b and 21a of the statute here involved is not sufficient and cannot authorize the invasion of private rights. (See, also, *McFarland v. American Sugar Ref. Co.,* 241 U. S. 79, 80; *Herminghaus v. So. Cal. Edison Co.,* 200 Cal. 81, 115; *San Bernardino v. Riverside,* 186 Cal. 7.) In the *Herminghaus* case a state statute declaring a public interest in the beneficial use of all waters in the state and attempting to define what would constitute such beneficial use and what would constitute a waste, was sought to be applied so as to deprive the riparian owners of the lifting force of the underflow of the stream in lifting water to the surface of their lands. The statutory purpose was to make the water alleged to be wasted by the owners (in that it could be more beneficially used by others) available for use and appropriation by the general public. The Edison Co. claimed as an appropriator under this statute. The court pointed out (p. 107) that this use by the riparian owner of the uplifting force of the underflow was actually

a beneficial use, which the riparian owner could not be deprived of under the police power of the state, nor without the exercise of the power of eminent domain, with compensation. The court said:

> "* * * *Neither a court nor the legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them.* Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. *If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain."*—200 Cal. 81, 112. (See, also, what the court said on p. 117.)

An analysis of the cases shows that the public interest in the privately owned natural resources of the state is limited to a proper regulation of the private correlative rights of owners in a common source of supply by preventing actual waste or other conduct by any one or more of them injuriously affecting the rights of other surface owners in the common source of supply.

Mr. Chief Justice Hughes is evidently of this view for he is quoted in the report of the Federal Oil Conservation Board of May 27, 1926, at page 12, as giving the following legal opinion to the American Petroleum Institute, not as an advocate but as a legal adviser:

> "It has already been pointed out to the board that the Legislatures of oil-producing states have enacted various laws of a regulatory sort intended to prevent waste. *It would not be safe, however, to infer that laws which were not appropriately designed to prevent improper methods in extracting the oil, or to*

protect the interest of proprietors drawing from a common reservoir so that the action of one should not work a deprivation of the rights of others, but were directed to the prevention or curtailment of production itself, would be sustained in the absence of compensation to the owner who was thus deprived of the use of this property. Still less can it be assumed that a state would have the power to compel an owner to subject his right to drill for oil on his property, *not to regulations to prevent waste or for the purpose of preventing injury to other owners having a similar right,* but, as has been suggested by some, to the will of the other owners as to whether or not drilling should take place; that is, to make the exercise of the owner's right, dependent upon the wishes of other individuals not vested with governmental authority."

While there are, in a few decisions (such as *Commonwealth v. Trent,* 117 Ky. 34) dicta or loose statements to the effect that the state has an interest in privately owned natural resources, not only to so regulate the rights of the private owners that the conduct of one or more of them will not impinge upon the rights of others, but also to preserve the same for the benefit of the general public and the people of the state, an analysis and examination of those cases shows that what the court actually held was that the public interest extended only to the regulation and protection of the private property interests of the different owners in a common source of supply by preventing waste and other conduct injuriously affecting the rights of other private owners. The lower court held that this was the basis of the legislative power [R. 339-340, 346.] The court, however, said that the quotations in its opinion "tend to indicate that the state may restrict or regulate the production of oil or gas on the theory of the public's interest in their natural resources. * * * But as indicat-

ing that there is grave doubt concerning this power we here make reference to the case of *West v. Kansas Natural Gas Co.*, 221 U. S. 229." [R. 346.] As stated by this court in *West v. Kansas Natural Gas Co., supra:*

> "* * * The natural resources of a state may be other than natural gas; for example, may be timber and coal and iron and other metals; but it is contended that the right of conservation extends to these, and the broad statement of the first question is qualified in the argument by the properties of natural gas and the limitation of its supply. This, it is contended, gives a range to the police power which otherwise it would not possess. * * *
>
> "We have reviewed the cases at some length, as they demonstrate the unsoundness of the contention of appellant based upon the right to conserve * * * the resources of the state, and that the statute finds no justification in such purpose for its interference with private property * * *."—221 U. S. 229, 252, 260.

If the character of private property as "natural resources" or the fact that there is some limit to the supply, or the mere legislative declaration that the public has an interest in its preservation, be sufficient to justify uncompensated deprivation of the use thereof for the benefit of the general public as consumers, then the same arguments would apply to coal, timber and various minerals held in private ownership. There is no limit to which the legislature might go, and all recognized principles of property rights would be thus destroyed. The same argument might extend to the natural products of the soil. But these considerations do not justify a taking or interference with the rights and uses of the private owners thereof for the benefit of the general public. (*Williams v. Standard Oil Co.*, 278 U. S. 235.)

"* * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."—*Pennsylvania Coal Co. v. Mahon*, 260 U. S. 416.

POINT E.

The Statute as Applied to Appellants Constitutes a Taking of Appellants' Property for a Public Use Without Compensation and Without Due Process of Law, in Violation of the Fourteenth Amendment.

Applying the principles set forth in the cases cited under *Point D* to the *admitted and undisputed facts of the case at bar*, there can be no doubt but that the statute as construed and applied to appellants constitutes a taking of appellants' property for a public use without compensation, and a taking without due process of law, in violation of the Fourteenth Amendment. It appears from these admitted facts that each of appellants' oil wells is operated with the utmost efficiency and at their optimum gas-oil ratio, which is amongst the lowest in the field, and is also "so operated that it does not injuriously affect the operations of others owning and/or operating wells in the field"; also that appellants are not taking an undue or unjust proportion of oil or gas from the field. It further appears that the sole purpose of the order made under the supposed authority of the statute, decreasing by over 50% the allowed gas production required by appellants in the efficient production of oil and gas as aforesaid, is *"to conserve such gas for the benefit of the general consuming public" for light, heat and fuel.*

The order of the Superior Court complained of itself shows on its face that this was the purpose of the decrease in the allowed gas production from the field. The Superior Court, after finding that there is an unreasonable waste of natural gas in the *field,* recites that the same might be reduced and conserved by an order "which will limit the waste of gas by restricting the production thereof to a quantity reasonably in excess of the present outlets for beneficial use above ground" [R. 296]. This the court proceeded to do by limiting the production of gas from the field as a whole to 285 million cubic feet per day, based solely on the "present outlets for beneficial use above ground" for light, heat and fuel. This was done without any regard for or consideration of the correlative rights of the owners and operators in the field to prevent waste or other conduct by one or more of them injuriously affecting the rights of others in the field, and instead of protecting such correlative rights, which would constitute "true conservation", as stated by this court in *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 254, in derogation and invasion of the rights of appellants and other operators in the field, took away from them the use of natural gas required for the proper and efficient production of oil, admittedly solely "for the purpose of conserving such natural gas for the benefit of the general public" for light, heat and fuel [R. 23]. The majority rule prevails in California that oil and gas in place are minerals and realty and belong to the owner of the land as long as they are on it or in it or subject to his control. The same can be sold or reserved in place by the owner, and instruments of sale thereof in place are required to be executed with the formalities of a conveyance of real estate and

create a corporeal rather than an incorporeal interest and sever the mineral estate from the surface estate (*Isom v. Rex Crude Oil Co.*, 147 Cal. 659; *Graciosa Oil Co. v. Santa Barbara*, 155 Cal. 140; *Duvall v. White*, 46 Cal. App. 305; *Brookshire Oil Co. v. Casmalia etc. Co.*, 156 Cal. 211; *Chandler v. Hart*, 161 Cal. 405, 412-413, 418; *Barlow v. Security Trust & Savings Bank*, 197 Cal. 263, 267; *Payne v. Neuval*, 155 Cal. 46; *Boone v. Kingsbury*, 77 Cal. Dec. 94; *Mills & Willingham, "The Law of Oil and Gas"*, 1926 Ed., pp. 20, 22; 1 *Thornton's Law of Oil and Gas*, par. 25a, p. 95; *Texas Co. v. Daugherty*, 107 Tex. 234, 176 S. W. 717, 719-721; *Bodcaw Lumber Co. v. Goode* (Ark.), 254 S. W. 345, 29 A. L. R. 578; *Osborn v. Arkansas Oil & Gas Co.*, 103 Ark. 175 Annotated Note, 29 A. L. R. 586-589).

Since the drainage area of an oil well in Santa Fe Springs field is not more than 50 to 100 feet around the well [R. 6, 152, 277] and generally in California the drainage area does not exceed more than 4 or 5 acres (*Chandler v. Hart*, 161 Cal. 405, 418), it makes very little difference whether the title of the surface owner in oil and gas *in situ* beneath his land is absolute or qualified, or is owned by him and his surrounding neighbors jointly, or whether all of the oil and gas deposits in the field are collectively owned by all of the surface owners,—the practical result is the same, for in no event can all or any of the private owners thereof be deprived thereof for the purpose of conserving the same for the benefit of the general public. It was said by this court in the *Ohio Oil Co.* case and the *West* case that "the surface owners of the soil, owners of

the gas as well, could not be deprived of the right to reduce it to possession without the taking of private property" (221 U. S. 229, 254). The deprivation need not be absolute; any deprivation of such right is *pro tanto* also a taking. It is an economic and legal principle that the highest attribute of property is the right of the owner to use and enjoy it according to its peculiar nature and adaptiveness. As stated by this court in *Buchanan v. Warley*, 245 U. S. 60, 74:

> "* * * Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property."

The use of private property is a right as much entitled to protection as the property itself, and an unauthorized restriction of the use thereof is as much a taking for constitutional purposes as if the property itself were taken. In *Penn. Coal Co. v. Mahon*, 260 U. S. 393, 414, Mr. Justice Holmes said:

> "* * * 'For practical purposes, the right to coal consists in the right to mine it.' * * * What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."

That under the due process clause the protection of the use of property is the all-important conception also appears from the following cases: *Pumpelly v. Green Bay Company*, 80 U. S. 166; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 439; *Branson v. Bush*, 251 U. S. 182; *Terrace v. Thompson*, 263 U. S. 197.

Depriving appellants herein of sufficient gas to efficiently produce oil at a proper gas-oil ratio without injuriously affecting the rights of other surface owners or operators in the field, results in appellants' daily oil production being diminished almost 10,000 barrels a day, and in their daily receipts being decreased by about $12,500.00, not to mention $2500 a day loss of casinghead gasoline, and also results in the shutting in, killing and permanently injuring many producing oil wells, costing approximately $150,000.00 each to drill. The gas of which appellants are deprived and which they are compelled to keep in the ground solely for the purpose of preserving the same for the future use and benefit of the general consuming public above ground for light, heat and fuel, is employed in the highly useful and beneficial purpose of efficiently producing oil without injuriously affecting the rights of other surface owners or operators in the field. Under these admitted facts, and under the decisions of this court hereinabove cited, it is respectfully submitted that the statute as applied to appellants constitutes a taking of appellants' property for a public use without compensation and without due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

While the opinion of the lower court held that the basis of the legislative power was the regulation and protection of the private correlative rights of the surface owners and operators in the field as against the waste and other conduct of one or more of them injuriously affecting others [R. 346], and that there is "grave doubt" as to the power of the state to legislate to conserve privately owned

natural resources for the future use and benefit of the general public [R. 346], citing *West v. Kansas Natural Gas Co.*, 221 U. S 29, and stated that the measure or standard of unreasonable waste of natural gas intended to be prohibited is the production of gas in producing oil in excess of a normal proportion of gas and oil for the field when such gas is not conveniently necessary for the generation of light, heat, power or other industrial purposes [R. 350-351, 363],—when the court proceeded to reply to these principles it overlooked or ignored the admitted facts above stated and upheld the order of the Superior Court. This construction of the statute in its application to appellants is, for all purposes of the jurisdiction of this court, conclusive evidence that the state of California intends by this legislation to authorize the taking of privately owned natural resources from surface owners and operators in the field solely for the purpose of conserving the same for the future use and benefit of the general public for light, heat and fuel, without any compensation therefor to such private owners. This is clear under the admitted facts shown in the record, the high points of which are referred to again at the beginning of the argument under this *Point E.*

> "* * * when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the state; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court. St. Louis South Western R. Co. v. Arkansas, 235 U. S. 350, 362."—*Coppage v. Kansas,* 236 U. S. 1, 15.

The inference in the opinion of the lower court that appellants are using greater quantities of gas than the gas-oil ratio standard set forth in the opinion, is wholly without factual foundation and contrary to the record, as is also the inference that the Superior Court so found. As to the first, we need do no more than refer to the admitted facts that appellants are operating each of their wells at their optimum gas-oil ratios, which are amongst the lowest in the field, and that "each well is so operated that it does not injuriously affect the operations of others owning and/or operating wells in said field, and that appellants are not taking an undue proportion of gas or oil from the field" [R. 361-3].

The alleged finding referred to by the District Court of Appeal as being a determination by the lower court that petitioners are unreasonably wasting natural gas, is contained in the following recital from the preliminary injunction:

> "There appears to be an unreasonable waste of natural gas *in the Santa Fe oil field.*"

And—

> "That the evidence available * * * shows that the unreasonable waste of natural gas *in said field* may be substantially reduced and that the equities of all parties may be fairly conserved by a preliminary injunction which will limit the waste of gas by restricting the production thereof to a quantity reasonably in excess of the present outlets for beneficial use above ground," etc.

Referring to this extract, the lower court said:

> "It does not appear from the facts presented to us that, in so far as the particular case before us is concerned, the court exceeded its jurisdiction in finding as we have already quoted."

It will be noticed, however, that the quoted finding is merely a finding of the existence of an unreasonable waste of natural gas *in the field*, and that there is no finding that any of the wells of petitioners are operating at an unreasonable or improper gas-oil ratio, either for the particular well or for the field. Under the admitted facts above referred to which were established by uncontradicted testimony [R. 7-8, 13], there is no factual basis for such a finding if one had been made. The Superior Court (if the statute is not wholly void on its face under Points G and H) utilized the full limits of its authority, as stated in the opinion of the lower court [R. 363], when it inserted paragraphs 1 and 2 of the preliminary injunction which enjoined each operator of the field

> "1. From blowing, releasing or permitting any natural gas to escape into the air from any well or wells in the Santa Fe Springs oil field before the removal of the gasoline from such natural gas.
>
> "2. From operating any well producing natural gas in the Santa Fe Springs oil field except while exercising a high degree of care in the selection and adjustment of appliances and in the use thereof for the purpose of keeping each producing well in its *'optimum gas-oil ratio'—the term 'optimum gas-oil ratio' being defined as the smallest number of cubic feet of gas which can be produced with each barrel of oil from the same well at the same time.*"

But the injunction does not stop with its requirement of a proper gas-oil ratio. It goes further, and inserts paragraph 3, which limits the allowed gas production of the field according to some unknown standard, not prescribed by the Legislature, but *enacted* by the court, based wholly upon the present market demands for gas above ground for light and heat. The order itself discloses that the

limitations of paragraph 3 thereof were not based upon any consideration of proper gas-oil ratios for the various wells in the production of oil (the standard prescribed by the statute according to the statements of the lower court —R. 351-2, 363), but were based solely upon an arbitrary, horizontal and blanket cut in the gas production of the field "to a quantity reasonably in excess of the *present outlets for beneficial uses*" above ground for light, heat and fuel, which the court arbitrarily fixed at 285,000,000 cubic feet of gas per day.

The admitted purpose of the decrease in the allowed production was to conserve such natural gas for the benefit of the general public for light, heat and fuel [R. 23], which also appears from the face of said provisions of the order itself. This curtailment and decrease of allowed gas production, the record therefore clearly shows, was not based upon any consideration of and had no relation to, proper gas-oil ratios or regulating the correlative rights of the owners or operators in the field by preventing waste or other conduct of one or more of them injuriously affecting the rights of other owners or operators in the field. On the contrary, it invaded and impaired such rights by taking away from appellants and other operators in the field the use of natural gas required for the proper and efficient production of oil, admittedly solely "for the purpose of conserving such natural gas for the benefit of the general public" for light, heat and fuel. This, under the cases cited, constitutes a taking of private property under the due process clause of the Fourteenth Amendment and requires the exercise of the power of eminent domain, with compensation.

POINT F.

Under the Admitted Facts, the Extent of the Invasion of Appellants' Property Rights Is so Great, so Arbitrary, so Oppressive and Unreasonable, That It Goes Too Far Under the Police Power of the State.

The natural gas of which appellants are sought to be deprived by the statute as construed and applied to appellants cannot constitutionally be said to be wasted, much less unreasonably wasted. The admitted facts show: It is being utilized efficiently in the production of oil at the optimum gas-oil ratio, and appellants' operations admittedly do not injuriously affect the rights of others. Their gas production is employed in the useful and nowise harmful production of oil. Such use does not result in an undue or disproportionate taking of oil or gas by appellants. [R. 6, 155.] The gas so produced by appellants is utilized a second time in the highly useful and beneficial and nowise harmful manufacture of casinghead gasoline. So much of the remaining residual dry gas as can be used by appellants for field and other purposes is used, and so much as can be sold is sold. The remainder admittedly can not be sold or given away, and has no value. It can not be stored except at exorbitant and prohibitive cost. Having been already utilized over and over again, and having no further use or value, it is permitted to escape into the air. Property cannot be taken by mere legislative fiat declaring that to be unreasonable *waste* which is not such in truth. (*Herminghaus v. Edison Co.*, 200 Cal. 81; *Coppage v. Kansas*, 236 U. S. 1, 16.) Having been reduced to possession in pipes of appellants; and being later in

the possession of appellants in its casinghead gasoline plant, it is, at the time it is released to the air, the absolute private property of appellants, the same as any other article of commerce (*West v. Kansas Natural Gas Co.*, 221 U. S. 229, 255). If it could be sold at the prevailing market price, it would bring only $1,300.00 a day. Even this saving would be less than 10% of the wealth produced by it, viz.: $12,500.00 a day in oil and $3,000.00 in casinghead gasoline. To say that appellants can be deprived of the right to the use thereof for such highly beneficial purposes, under conditions not injuriously affecting the rights of others, solely for the purpose of conserving the same in the ground until it may be used by the general consuming public above ground for light, heat and fuel is certainly to "let the tail wag the dog."

In this connection, we call attention to the following comment of this court in answer to the argument in the *Walls* case addressed to the impossibility of complying with the Wyoming statute which required the heat content of gas being fully and actually utilized:

> "As we have seen, many affidavits were addressed to the impossibility of complying with the statute; that is, of utilizing the heat of natural gas to the extent of the words of the statute. We say to the extent of the words of the statute, because we think *the statute must be construed with reference to the facts of nature and their possibilities,* and that all that was intended by the words employed was to require *a practical and possible use of the heat,* as in

other fuels, *and by the existing instrumentalities,* and if this should be done, it was a legal use of the gas,—was an application and utilization of the heat contained in it."—254 U. S. 300, 325.

The necessary inference from this language is that if the statute had required more than "a practical and possible use * * * by the existing instrumentalities" it would have been going too far under the police power.

Foster Fountain Packing Co. v. Haydel, 278 U. S. 1, is another case where an attempt was made to let the tail wag the dog. There a statute of Louisiana made it unlawful to export from the state any shrimp from which the heads and hulls have not been removed, and, in order that all its inhabitants "may enjoy the state's natural food product", it was made unlawful to export from the state any raw shells or hulls and heads "as they are required to be manufactured into fertilizer or used for an element in chicken feed". The statute provided that title to the shrimp should remain in the state but that when "they have been conserved for the purpose herein stated" the right of property should pass to the lawful taker. *The value of the bran and fertilizer made from the hulls and heads and shells was worth less than 1% of the value of the shrimp, and not more than half the hulls and heads removed were used for any purpose.* As stated by this court, *"they have no market value, cannot be sold or given away, and often constituted a nuisance"* (278 U. S. 8-9). The court held that the conservation of the hulls and heads

was a feigned and not the real purpose, and that the statute was an unwarranted invasion of the business of appellants.

The facts of the case at bar are much different from the record presented in the *Ohio Oil Co.* case. The oil company's operations were injuriously affecting the operations of all other surface owners in the field. In the case at bar the exact contrary is admitted. In that case a pure natural gas reservoir existed under nine or more counties, in which the gas moved freely and the gas pressure throughout the field was always the same, and all operators were injuriously affected by a disproportionate use or waste of the gas. All of the operators in the field were in the business of producing gas alone from this reservoir. After a large industrial area had been built over this reservoir of gas, oil in a lower stratum was discovered by the Ohio Oil Company, and in the oil production it allowed large quantities of gas to escape into the air which resulted in a disproportionate taking and injuriously affected all of the other operators in the field by materially decreasing the gas pressure throughout the field, so that salt water would visit the formation and greatly injure or completely destroy the common supply. In the Santa Fe Springs *oil* field *all* of the operators are engaged in oil production. There are no free gas zones affected. The production of gas is the incidental by-product of *all* of the operators in the field. [R. 9.] In Indiana the demand for natural gas greatly exceeded the supply, whereas in California the supply greatly exceeds the demand (*People v. Associated Oil Company,* decided by the Supreme Court of California, p. 36, Supplement to Appellees' Brief). The oil pro-

ducing formation is such that a well penetrating it does not affect or decrease the pressure throughout the field but only in the immediate vicinity of the well, not exceeding a radius of 50 to 100 feet [R. 6, 102, 124, 277]. This, together with the admitted facts that appellants are operating each of their wells at a proper gas-oil ratio, amongst the lowest in the field, and so as not to injuriously affect others in the field, and are not taking an undue proportion of gas or oil, makes the admitted facts of this case just the opposite of those in the *Ohio Oil Co.* case, which requires just the opposite conclusion. The same factual differences exist between the case at bar and the *Walls* case and the *Lindsley* case.

The undue severity of the statute as construed and applied to appellants is patent. There was no factual basis therefor under the admitted power of the state to regulate and protect the correlative private rights of owners and operators in the same field against waste or other conduct injuriously affecting other operators in the field. If it could be assumed that the public interest justified any curtailment or limitation upon the production of gas by appellants and others for the general welfare of the public as consumers (which we cannot concede), under the admitted facts of this case it appears that the extent of the invasion of the property rights of appellants is so great, so arbitrary and so oppressive and unreasonable, that it goes too far under the police power and requires the exercise of the power of eminent domain, with proper compensation (*Pennsylvania Coal Co. v. Mahon, supra*). The effect of the statute as construed and applied to appellants already appears from the statement of facts at the beginning of this brief. Appellants' oil production is cut in

two, resulting in a daily loss of $12,500.00 in oil production and $3,000.00 in casinghead gasoline, to say nothing of the permanent and irreparable injury caused by the shutting down and killing of many oil wells costing on an average of $150,000.00 each. That this is too great a loss and invasion under the police power without compensation, appears from the mere statement of the facts. This is particularly true where the purpose to be accomplished has no proper relation to the legislative power of regulating and protecting privately owned natural resources, but is admittedly for a purpose which is diametrically opposed thereto. That the extent of the invasion of appellants' property rights is so great, so arbitrary, so oppressive and so unreasonable, under the admitted facts of this case that it goes too far under the police power of the state, is settled by the following decisions: *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393; *Dobbins v. Los Angeles,* 195 U. S. 223; *Lawton v. Steele,* 152 U. S. 133-137; *Buchanan v. Warley,* 245 U. S. 60; *Coppage v. Kansas,* 236 U. S. 1; *Herminghaus v. Southern California Edison Co.,* 200 Cal. 81; *Ex parte Kelso,* 147 Cal. 609. Certainly this presents a substantial federal question of a character requiring full consideration on its merits and a denial of the motions to dismiss or affirm.

For an interesting and illuminating discussion of the scope and extent of the legislative power of the state and an analysis of various statutes and decisions relating to oil and gas, showing the serious and substantial character of the federal questions presented thereby, see article in Vol. 52, Reports of American Bar Association, 1927, p. 577, entitled "Legislative Control of the Business of Producing Oil and Gas," by James A. Veasey.

POINT G.

The Statute Involved Is Void for Uncertainty and Lack of a Sufficiently Definite Standard of Conduct Under the Due Process Clause of the Fourteenth Amendment.

The rule that the construction of a state statute by the highest court of the state is accepted by this court, does not apply when the state construction is conflicting or unsettled. In such a case this court will construe the statute for itself. (*Concordia Ins. Co. v. Bryan,* Case No. 278, Oct. Term 1930, 75 L. Ed. 387, 391; *Edward Hines Yellow Pine Trustees v. Martin,* 268 U. S. 458; *Portneuf-Marsh Valley Canal Co. v. Brown,* 274 U. S. 630; *Burgess v. Seligman,* 107 U. S. 20; *Railroad Com. v. Los Angeles R. Corp.,* 280 U. S. 145.)

The Construction of the Statute Involved by the Highest Courts of the State Is so Conflicting, Uncertain and Unsettled That This Court Should Adopt Its Own View as to the Standard or Measure of Unreasonable Waste of Natural Gas Prohibited, If Ascertainable From the Statute.

An examination and analysis of the opinion of the lower court and of the later opinions of the Supreme Court of California in *People v. Associated Oil Company* disclose that they are uncertain and hopelessly in conflict in their statements as to the construction of the state statute involved, and disclose also in that what the lower court really said is the measure of unreasonable waste of natural gas prohibited by the statute is wholly at variance with the effect of its decision in the application of the statute to appellants under the admitted facts contained in the record.

The lower court, after pointing out that the basis of legislative power in such matters is the regulation of the private correlative rights of the surface owners and operators in the underlying deposits of oil and gas as against waste or other conduct by one or more of them injuriously affecting the operations of other owners or operators in the field, and that there is "grave doubt" concerning the legislative power on the theory of "the public's interest in their natural resources" [R. 346], says that

> "It is also apparent from a reading of the entire act that unreasonable waste of gas is considered to be the production of an undue proportion of gas to the amount of oil, in the particular field involved, by one surface owner as against others, in those instances where the gas is not conveniently necessary for the 'generation of light, heat, power or other industrial purpose.' That this is the intent and purpose of the law is made manifest from the following quotation from section 8d: 'If it shall appear that gas is being produced from any oil well or wells in quantities exceeding *a reasonable proportion to the amount of oil produced from the same well or wells,* even though it is shown that such excess gas is being used in the generation of light, heat, power or other industrial purpose and that there is sufficient other gas available for such uses from other wells in the same or other fields in which the gas produced is not in excess of the amount which bears *a reasonable proportion to the amount of oil produced* from such other wells and that there are adequate gas-pipe-line connections between such other wells and the place of utilization of such gas the state oil and gas supervisor shall hold that such excess production of gas is unreasonable waste thereof if such holding will not cause an unreasonable waste of gas in any other field.' (Italics ours.) The legislation was evidently adopted upon the theory that in every oil field there is what we may term (at least for illustrative purposes) a normal proportion of gas to oil; that when an unreason-

> able disproportion of gas to oil exists in a given well there is a corresponding loss of recoverable oil by other owners who would otherwise employ the lifting power of the excessive gas to good purpose; and that this disproportionate production of gas should not be permitted unless the gas as a separate thing be conveniently necessary for domestic or industrial purposes. We have not overlooked the fact that the act makes the blowing or release of gas into the air *prima facie* proof of unreasonable waste. * * *
>
> "* * * we are convinced that a proper construction of the enactment confines the authority within the limits of enjoining the production of gas when in excess of the reasonable proportion to the oil for the particular field involved, when not conveniently necessary for other than lifting purposes." [R. 350-352, 363.]

The standard thus adopted as the measure of unreasonable waste of natural gas is the normal or reasonable gas-oil ratio *for the field* except where more gas is produced because conveniently necessary to supply consumers for light, heat, fuel or other industrial purpose [R. 361-2]. The lower court further said that the admitted fact that appellants' wells are not producing an undue proportion of gas when the production is measured by oil from the specific well is *immaterial* as conceivably such a well might injuriously affect the rights of other owners if it were what is known as a "gasser" [R. 361-2]. The lower court, however (in what it actually did), failed to apply or follow the standard or measure of unreasonable waste, or the principle or basis of the legislative power, which it expressed in its opinion. It overlooked or entirely ignored: the admitted fact, established by the uncontradicted evidence, that the gas produced from appellants' wells is not in excess of the amount which bears a reasonable propor-

tion to the amount of oil produced from such wells [R. 8, 135]; that the gas-oil ratios of appellants' wells are amongst the lowest in the field [R. 13]; that said wells are operated so as not to injuriously affect the rights of other owners and operators in the field [R. 13]; that none of appellants is producing from its wells an undue or unreasonable amount of oil or gas or more than its just share or proportion [R. 6, 139, 155]. Strange to say, the court approved the order of the Superior Court limiting the gas production from the field, which shows on its face that said order was not based upon any consideration of proper gas-oil ratios of any one or more wells or of the field but solely upon the available gas outlets of gas from the field as a whole for use above ground for light, heat and fuel [R. 296]. The court also ignored the admitted allegation that the sole purpose in the decrease in the allowed gas production of the field was to reserve such gas for the future use and benefit of the general public [R. 23].

About a week after the opinion of the lower court was rendered the Supreme Court of California, in *People v. Associated Oil Company* (opinion not yet officially reported but printed as Appendix "C" to Supplement to Appellees' Brief) adopted a construction of the statute widely at variance with the construction of the statute as stated in the opinion of the lower court herein [Appendix "B", p. 19, Supplement to Appellees' Brief]. The Supreme Court held that the legislative power in the premises was to regulate not only the private correlative rights of the surface owners as against waste and other conduct of one or more of them injuriously affecting others of them, but also to conserve privately owned natural resources in the

interest of the public as consumers [pp. 30-32, Supplement to Appellees' Brief]. That court adopted the "optimum" or "best mean" gas-oil ratio of *each well* as the standard or measure of unreasonable waste intended to be prohibited, which the District Court of Appeal said was immaterial. The California Supreme Court said:

> "It fairly appears on this application that, depending on its location in the oil reservoir, the extent of the oil 'sand,' the degree of pressure within the formation, the amount of oil in the 'sand,' the amount of gas in solution with the oil, the porosity of the 'sand' and other considerations, *each oil and gas well has a best mean gas and oil ratio in the utilization of the lifting power of the gas and the production of the greatest quantity of oil in proportion to the amount of gas so utilized,* and which may be computed as to each individual well to a reasonable degree of certainty and be regulated accordingly. *Gas, therefore, which has been allowed to come to the surface without its lifting power having been utilized to produce the greatest quantity of oil in proportion, may be said to amount to an unreasonable waste of natural gas.*
>
> "*That the legislature intended to prohibit such a waste of natural gas, and so defined the term 'unreasonable waste,' is quite apparent from a consideration of the provisions of a portion of section 8d of the act.* Section 8d relates to the procedure upon complaint of undue waste filed with the director of natural resources, and the portion thereof immediately quoted is offered to us by petitioners as the only statement in the act of any standard of 'unreasonable waste,' viz.: 'If it shall appear *that gas is being produced from any oil well or wells in quantities exceeding a reasonable proportion to the amount of oil produced from the same well or wells,* even though it is shown that such excess gas is being used in the generation of light, heat, power or other industrial purpose, and that there is sufficient other gas available for such uses from other wells in the same or other fields in

which the gas produced is not in excess of the amount which bears a reasonable proportion to the amount of oil produced from such other wells, and that there are adequate gas-pipe-line connections between such other wells and the place of utilization of such gas, the state oil and gas supervisor shall hold that such excess production of gas is unreasonable waste of gas if such holding will not cause an unreasonable waste of natural gas in any other field.' *It would seem, therefore, that the legislature has plainly adopted the standard so expressed, viz.: that gas may not be produced, under existing conditions where the production thereof so greatly exceeds the market demand therefor, in quantities exceeding a reasonable proportion to the amount of oil produced, as the standard to be applied and beyond which the production is prohibited as being an unreasonable waste of natural gas.*

"The standard so adopted by the legislature is, we think, not objectionable as being too vague or uncertain of application. * * *

"* * * The statute held valid in the case of *Ohio Oil Company v. Indiana, supra,* permitted no waste of gas whatsoever for a longer period than two days after gas or oil had been struck. The margin between no waste at all and a reasonable waste *in recognition of the propulsive function of the gas is largely one of fact.* In the ascertainment of the fact the legislature has vested in the superior court full power and duty in the premises."—Opinion of Supreme Court of California, decided Dec. 3, 1930, not officially reported, *People v. Associated Oil Co., et al.,* on application for Writ of Supersedeas [pp. 35-37, 38, 41-42, Supplement to Brief of Appellees].

These definite statements by the Supreme Court adopting the optimum or best mean gas-oil ratio *of each well* as the standard of unreasonable waste prohibited by the statute are, however, considerably clouded and made uncertain by later statements in the said opinion of that

court in discussing other questions. For instance, in answering the contention that the real purpose of the statute is to curtail the production of oil so as to regulate and stabilize the market price thereof, the court said:

> "* * * We cannot agree with this contention. *Obviously the enactment is an effort on the part of the legislature to conserve for present and future needs great natural resources in which the people of the state are interested.* It may be that the enforcement of the statute throughout the gas and oil producing sections of the state may have an effect upon the market price of oil. For this reason the subject matter of the act is a delicate one for legislative treatment and judicial cognizance. But the fact that the field of economic law to some extent may thus be invaded may not justify the avoidance of the statute. *As we view the terms of the act the primary function of gas in the production of oil is recognized, and its complete utilization in that respect, without unnecessary waste, is attempted to be safeguarded. The additional function of the gas in providing light and heat for manufacturing and domestic purposes is also recognized, and the effort is made to compel the fullest utilization as to both functions. The act, without doubt, was a response to a growing recognition that the continuing and increasing waste of the propulsive energy of gas underground and of its full energy above ground was unreasonable and should be inquired into and regulated, to the end that the public convenience and general prosperity of the commonwealth be promoted.* Such legislation should not be stricken down because there may be an incidental and unavoidable interference in the economic field."—Opinion of Supreme Court of California, *People v. Associated Oil Co., et al.* [pp. 39-40, Supplement to Brief of Appellees].

These statements are inconsistent with the provisions preceding, defining the optimum or best mean gas-oil ratio of each well as the standard or measure of unreason-

able waste, if intended to require also complete and fullest utilization of the gas above ground for light, heat, fuel and other industrial purpose after the gas has been properly utilized in producing oil. However, it would seem that if this additional requirement had been intended by the court, it would have been included in its previous discussion defining what constitutes unreasonable waste of natural gas under the statute. The court stated that the statute contemplated "a reasonable waste in recognition of the propulsive function of the gas" (p. 42), and on page 36 said:

> "* * * It would seem, therefore, that the legislature has plainly adopted the standard so expressed, viz.: that gas may not be produced, *under existing conditions where the production thereof so greatly exceeds the market demand therefor,* in quantities exceeding a reasonable proportion to the amount of oil produced, as the standard to be applied and beyond which the production is prohibited as being an unreasonable waste of natural gas."

The plain inference is that "The California statute recognizes the use of gas as a propelling agency in the production of oil and contemplates that within reasonable limits gas may be used for that purpose and thereafter be allowed to escape" (*Ambassador Petroleum Company v. Superior Court*, 79 Cal. Dec. 67.) Whether, in addition to the requirement of a proper gas-oil ratio, the statute places any limitation in the interest of the general public upon the amount of gas properly used in the production of oil which may thereafter escape into the air, is thus left wholly uncertain and in doubt, as is also the extent of any such limitation.

The factors to be used and the relative weight of each in determining how much gas so utilized may be blown to the air, and how much thereof is required to be reserved in the ground in the interest of the general public, are left for each operator to determine at his peril according to a standard subsequently erected by a court or jury which "'must be as variable and uncertain as the views of different juries [and judges] may suggest and as to which nothing can be known until after the commission of the crime'." (*In re Peppers,* 189 Cal. 687, quoting from *Louisville etc. Railroad Co. v. Commonwealth,* 99 Ky. 132, 35 S. W. 129.) "'* * * The manifest danger in the administration of justice according to so shifting, vague and indeterminate a standard would seem to be a strong reason against adopting it.'" (*Cline v. Frink Dairy Co.,* 274 U. S. 445, 462.)

As stated by Mr. Chief Justice White in *United States v. Cohen Grocery Co.,* 255 U. S. 81, 89:

> "* * * to attempt to enforce * * * [such a provision] would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all *acts detrimental to the public interest* when unjust and unreasonable in the estimation of the court and jury."

There is another important variance and difference between the opinion of the lower court and the said opinion of the Supreme Court of California. The statement of the standard in the opinion of the lower court includes permission for an operator to produce more gas than is reasonably necessary to utilize in the operation of a well at a normal gas-oil ratio for the field in the efficient production of oil if such gas is "conveniently necessary for the gen-

eration of light, heat, fuel or other industrial purpose" [R. 350, 363]. Such a factor is wholly absent in the said opinion of the Supreme Court of California. The introduction of such a factor makes it possible for one or more operators to operate at a gas-oil ratio injuriously affecting other owners and operators in the field in order to supply such gas for uses above ground to the general public for light, heat and fuel.

To add to the confusion and uncertainty, counsel for appellees hereunder, on behalf of the state, declared in their Reply to the Petition for Rehearing in the state court (p. 27):

> "By the opinion in each court the act is construed to prevent unreasonable waste in three particulars:
>
> "1. The operation of a well so as to produce more gas than is required under the optimum gas-oil ratio of the well.
>
> "2. The operation of a well so as to produce at a higher gas-oil ratio than is reasonable in the field even though a well operating at its optimum gas-oil ratio must be killed.
>
> "3. The operation of a well so as to produce gas in such quantity as to blow to the air an unreasonable proportion of the quantity of gas produced after the gasoline is removed therefrom where there is no market demand for the gas."

Finally, to add further to the confusion and uncertainty, the Supreme Court of California, in its opinion on the merits of the appeal in *People v. Associated Oil Co.*, decided March 26, 1931 [not yet officially reported but presented

as Appendix "C," p. 45 of Supplement to Brief of Appellees], declared (pp. 48, 50) that the state had the power of

> "* * * regulation under the police power, not only to the end of protecting the correlative rights of the owners and operators in this field, but also the *rights of the public which has a direct interest in safeguarding this important natural resource.* * * *
>
> "We reiterate that the legislation in question has lawfully vested in the Superior Court the power to determine what wastage of gas in the production of oil is reasonable or unreasonable. Whether such wastage be reasonable or unreasonable is a question of fact and should be determined *in view of the necessity of one landowner to make productive use of his parcel, in view of the equal right of the adjoining owners not to be deprived of correlative production from their parcels, and in view of the right of the public to prevent the waste of that which cannot be replaced.*"

The court does not expressly refer to the gas-oil ratio standard in its previous opinion or to whether the gas-oil ratio in the particular well involved there complies therewith, and devotes most of its opinion to the question of whether the order of the Superior Court is discriminatory as to such well. While it contains no language overruling or repudiating its statement that the best-mean or optimum gas-oil ratio *of each well* is *"the"* measure or standard of unreasonable *waste* intended to be prohibited by the statute, the language in the last paragraph of the above quotation therefrom, together with the discussion of the order of the lower court, tends to indicate that there are other factors, the exact nature and relative weight of which are not set forth.

The Total Invalidity of Section 8d of the Statute, Upon Which the State Construction is Based, Renders the State Construction Without Merit and Also Requires This Court to Adopt Its Own View of the Statute.

That both the District Court of Appeal and the Supreme Court of California based their construction of the statute upon section 8d, is indicated by the foregoing extracts from their opinions. Section 8d on its face is repugnant to the due process and equal protection clauses of the Fourteenth Amendment. It provides that at the conclusion of the hearing and proceedings before the supervisor of oil and gas therein provided for, he shall make an order, and expressly authorizes the supervisor, even though an unreasonable waste of natural gas is found to exist, to order the discontinuance thereof only "to the extent stated in said order." This gives absolute, arbitrary, unguided and uncontrolled discretion and power to the supervisor to punish his enemies and favor his friends, which is condemned under the federal constitution by what this court said in a like case, in *Yick Wo v. Hopkins*, 118 U. S. 356. The word "arbitrary" is defined by Webster as "not governed by any fixed rule of conduct." We quote the following famous passage from *Yick Wo v. Hopkins, supra*, where this court said:

> "* * * But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws

> and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." (118 U. S. 356, 370.)

Such power was condemned under the federal constitution as a violation of both the equal protection and the due process clauses of the Fourteenth Amendment. Since this invalid provision of section 8d refers to the order to be made at the conclusion of the hearing therein provided for, with which alone the section deals, the entire action is invalid. It cannot be supposed that the Legislature would have provided for proceedings and a hearing leading up to the order therein provided for if the provisions for the order itself were known to be invalid. This is true, even though the statute provides that the invalidity of any provision shall not affect the remaining provisions. (*Williams v. Standard Oil Co.*, 278 U. S. 235, 242.)

So, even if the state construction of the statute were not conflicting, uncertain and in doubt, and the matter of the construction of the statute be regarded as a non-federal question, the federal question of the validity of section 8d is inseparably bound up with and interwoven with the construction of the statute sought to be invoked against appellants and for this additional reason this court has jurisdiction, therefore, to inquire into the matter. Furthermore, even if the state decisions construing the statute were not conflicting and wholly uncertain as to what is prohibited by the unreasonable waste of natural gas, and even if, under the circumstances, the construction of the statute could be regarded as a non-

federal question, this court should itself consider whether the construction of the statute is not wholly lacking in merit, in order that it may determine the federal questions and federal rights presented. (*Terre Haute & I. R. Co. v. Indiana ex rel. Ketcham,* 194 U. S. 579; *Ward v. Love County,* 253 U. S. 17; *Baltimore & Ohio R. R. Co. v. Maryland,* 87 U. S. (20 Wall) 643; *Klinger v. Missouri,* 80 U. S. (13 Wall) 257.) In the first of these cases the state court's decision was based upon an untenable construction of a railway charter.

Furthermore, even though this court were bound by the state construction of the statute, it is not precluded by its reasoning but must exercise an independent judgment when called upon to determine the federal question whether the statute is void for uncertainty under the Fourteenth Amendment and the federal question whether the act as construed and applied to the concrete facts of this case is repugnant to the clauses of the federal constitution relied upon by appellants. (*Ward v. Krinsky,* 259 U. S. 503.)

Whether This Court Adopts Its Own View or Follows the Construction Adopted by the Lower Court or Follows the Latest Decision by the Supreme Court of California, the Statute is Void for Lack of a Sufficient Standard or Measure of What Constitutes "Unreasonable Waste of Natural Gas" to Satisfy the Due Process Clause of the Fourteenth Amendment.

This court long ago declared: "If the Legislature undertakes to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is com-

mitting a crime. * * * It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." (*United States v. Reese,* 92 U. S. 214, 220, 221.)

Indeed, it is a rule of ancient origin that statutes "ought to be plainly and clearly, and not cunningly and darkly penned, especially in legal matters" (Mr. Justice Brewer, in *Chicago N. W. R. R. Co. v. Dey,* 35 Fed. 866, 876). "No penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and may not do under it." In that case the statute held void made it unlawful to charge more than a *"reasonable rate."*

As stated by Chief Justice Taft in *Cline v. Frink Dairy Co., supra:*

> *"The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation (A. B. Small Co. v. American Sugar Ref. Co.,* 267 U. S. 233, 238 *et seq.,* 69 L. Ed. 589, 593, 45 Sup. Ct. Rep. 295), *but the fact that it is often necessary to investigate and decide certain questions in civil cases is not controlling or persuasive as to whether persons may be held to civil or criminal liability for not deciding them rightly in advance.* * * *"

The provision of the statute here involved, is both criminal and civil in its nature (see Secs. 8b, 8d, 9, 14a, 14b, 21). Section 8b provides: "The unreasonable waste of natural gas by the act, omission, sufferance or insistence of the lessor, lessee or operator of any land

containing oil or gas, or both, whether before or after the removal of gasoline from such natural gas, is hereby declared to be opposed to the public interest and is hereby prohibited and declared to be unlawful. The blowing, release or escape of natural gas into the air shall be *prima facie* evidence of unreasonable waste." (Stats. 1929, Chap. 535.) The other sections above referred to provide for its enforcement by civil and criminal proceedings.

The statute nowhere defines what shall constitute "unreasonable waste of natural gas" or "reasonable waste of natural gas," nor are the words "waste" or "unreasonable" anywhere defined in the act. *"The term 'unreasonable waste of natural gas' did not at the time of the enactment of said statute have, and has never since acquired, any established or settled meaning by usage or custom"* [R. 21]. *This allegation is admitted by the demurrer* to the petition for writ of prohibition. The statute prohibits no specific or definite act. It is to be noted that the statute does not prohibit any waste of natural gas, but only the unreasonable waste of natural gas, and impliedly permits a reasonable waste of natural gas. The words "waste" and "unreasonable" are *each* relative terms which may widely vary in meaning from one extreme to the other, depending on the viewpoint and the factors considered, and when used together demonstrate the absolute uncertainty as to the guide or standard to be applied.

It has been said that an attempt to define the word "reasonable" is like trying to count what is not number and to measure what is not space. As stated in *Louis-*

ville & Nashville R. R. Co. v. Interstate Commerce Commission, 184 Fed. 118:

> "The term 'reasonable' is very elastic in its meaning. It lacks the quality of certainty which is desirable in a statute. One man may give it a definition of a very broad, and another a very narrow, significance."

Likewise, the expression "to waste" is defined in Webster's New International Dictionary as: to spend or expend unnecessarily, carelessly, or without valuable result; to apply to useless ends; to squander. If applied to a useful and profitable end such as producing oil, is it wasted? What degree or extent of utilization is required and to what objects and under what circumstances? Waste may mean physical waste, or economic waste. Much depends upon the viewpoint from which the inquiry is approached, and what factors are to be considered and the relative weight of each. The matter may be approached from any number of viewpoints, as follows: 1. From the viewpoint of the individual operator, the financial and other circumstances of no two of whom are alike; 2. From the viewpoint of producers in the same part of the field; or in the same oil and gas stratum; 3. From the viewpoint of the whole field; 4. From the viewpoint of other fields; 5. From the viewpoint of producers and/or consumers of oil who are interested primarily only in the oil and gasoline produced, and the price thereof; 6. From the viewpoint of *consumers* of natural gas; or 7. From the viewpoint of the local community or of the state, or even of the nation. The statute itself does not indicate from which of these varying viewpoints the inquiry is to be approached.

The Insufficiency of the Statute Under the Latest Expression of the Highest State Court.

If this court adopts the last statement of the highest court of California on the subject, the inquiry, it may be argued, must be approached from three separate and distinct viewpoints: 1. "in view of the necessity of one landowner to make productive use of his parcel"; 2. "in view of the equal right of the adjoining owners not to be deprived of correlative production from their parcels"; 3. "in view of the right of the public to prevent the waste of that which cannot be replaced" [p. 50, Supplement to Brief of Appellees]. These three general classifications group the different viewpoints hereinabove stated, from which the inquiry is to be approached. This latest expression of the highest judicial tribunal of the state, if it can be said to settle the construction of the statute, should be followed by this court (*Bauserman v. Blunt,* 147 U. S. 647, 653). The result, however, is just the same except that this statement of the Supreme Court of California demonstrates the uncertainty of what is meant by the "unreasonable waste of natural gas" by expressly stating the inquiry is to be approached from these varying viewpoints.

1. *Approaching the Matter From the First of the Three Viewpoints Expressed by the State Court.*

The necessities of each landowner to make productive use or his or her parcel will vary widely, depending upon the financial condition of each landowner, the amount of oil storage he may have on hand, the contracts he may have to supply oil or gas, the extent of his indebtedness, whether or not the cost of drilling has been paid, and

many other factors, the exact weight, nature and importance of which is not disclosed. If one operator can take into view his own necessities, then each operator in the field can do likewise, and necessarily, each operator must take into view the necessity of every other operator.

2. *Approaching the Matter From the Second Viewpoint.*

This viewpoint is that of the equal right of adjoining owners not to be deprived of correlative production from their parcels; but the factors to be considered and the relative weight and importance of each are not disclosed. It depends upon whether adjoining owners are producing from the same zone, the number and relative location of their wells, the respective optimum gas-oil ratios of wells (which vary in each zone, even in the same part of the field and during the life of each well, increasing as the well becomes older according to the admitted facts), the extent of the relative oil production, the extent to which adjoining owners have contracts for the natural gas produced by them, and other factors, many of which would be difficult, if not impossible, of ascertainment. Much might depend upon whether the optimum gas-oil ratio *for each well* is to be used as a factor or test or whether the normal or reasonable gas-oil ratio *for the field* is the test. While the former might be ascertained by each operator as to his own wells, it would be impossible for him to acquire knowledge of whether wells on adjoining properties were complying with this test. The statute provides no means of affording such information.

If the normal or reasonable gas-oil ratio *for the field* is a factor, it is wholly insufficient as a guide or standard because of the many and varying complex factors in-

volved beyond the knowledge of the operator, and also because of the inherent uncertainty and inability of determining what constitutes a normal or reasonable gas-oil ratio for the field. If the operator had means of acquiring knowledge of all the varying gas-oil ratios of wells in the field and of the different zones from which they were producing, and the varying conditions and circumstances of each, he would have to guess at what point the ratio exceeded a normal or reasonable gas-oil ratio for the field. The opinion of the lower court refers to a well which is commonly called a "gasser," that is, "a well that produces an insignificant quantity of oil" compared to the amount of gas utilized in its production. "We have instanced an extreme possibility, but our interpretation of the act is that it was intended to remedy a lesser but nevertheless unreasonable degree of waste of the same character" [R. 362]. There is no way of determining when such a situation arises. Undoubtedly there would be many wells whose optimum gas-oil ratio would be much below what many would call an unreasonable gas-oil ratio for the field. Is one adjoining operator, the optimum gas-oil ratio of whose well is 8,000 or 10,000 cubic feet of gas per barrel of oil, to be permitted to operate on that basis, assuming such ratio is not to exceed a reasonable or normal gas-oil ratio for the field, while his immediately adjoining neighbor, the optimum gas-oil ratio of whose well is 2,000 or 3,000 cubic feet of gas per barrel of oil, is limited to such decreased amount of natural gas? The admitted facts are that the gas-oil ratios vary widely [R. 8]. They run from 115 cubic feet per barrel of oil to 18,000 cubic feet per barrel of oil [R. 269, Exhibits B and C, 281]. This court has

said that the use of the word "normal" in a statute referring to "normal shipments in interstate commerce" is too vague and indefinite to satisfy the due process clause (*United States v. Pennsylvania R. Co.*, 242 U. S. 208, 237-238). Many other like expressions are condemned in the cases we have cited.

3. *Approaching the Matter From the Viewpoint of the Third of the Three Viewpoints Expressed by the Supreme Court of California.*

This viewpoint is that of the public interest, or "the right of the public to prevent the waste of that which cannot be replaced," in the interest of reserving the same for the benefit of the consuming general public: Who is to determine the extent of the curtailment required by the public interests? How can any operator determine in advance how much curtailment should be made for such purpose? What are the factors to be used, and what is the relative weight to be given to each? This court has said that a statute leaving to varying concepts and ideas of citizens to whom the statute is directed or of courts or juries later called upon to pass upon the matter of "how much restraint of competition is in the public interest, and how much is not" is "so shifting, vague and indeterminate a standard" that it does not satisfy the requirements of the Fourteenth Amendment, as it requires setting sail "on a sea of doubt" (*Cline v. Frink Dairy Co.*, 274 U. S. 445, 462).

4. *Applying All Three Viewpoints Together.*

When we come to apply all three of these varying viewpoints and the various and complicated factors and their relative weight, the manifold complexity and uncertainty

presented is so manifest that it does not require argument to show that it goes far beyond what is required to satisfy the due process clause under the decisions of this and other courts we have cited. As stated by this court in the Cohen Grocery Company case, "It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against" (*United States v. Cohen Grocery Co.*, 255 U. S. 81, 89).

If This Court Adopts Its Own View of the Statute the Vice of the Statute in Failing to Provide Any Ascertainable or Sufficiently Certain Measure or Standard of Conduct, Clearly Appears.

In addition to what has already been said as to the inherent uncertainty, this uncertainty is multiplied manyfold when the various factors which may or may not be considered are approached, such as the financial profit or loss, depending on the various viewpoints; financial conditions considered from the various viewpoints; market demands, which depend upon changing conditions; the supply of both oil and gas available from this or other fields; various other economic conditions, such as transportation facilities, pipe lines available, the sources of supply, and the amount available therefrom from time to time; geological conditions, which vary in different fields and in each stratum in the same field, and in various portions of each stratum; the position of the particular operator in the field, the physical and/or mechanical conditions under which he is operating; the size of his holdings; other commodities coming into competition with oil and/or gas, such as coal, electric energy, etc.; the relative

importance to be given to oil and/or gas as a factor; whether the gas has been utilized; the degree of utilization required; whether when once used it must be put to other uses; how many times it must be used, etc.

Naturally, what might be considered waste or unreasonable waste or reasonable waste would vary greatly, depending upon circumstances, conditions and the viewpoint; and even from the same viewpoint, it might vary considerably, depending upon different ideas or theories or philosophies of each group and the relative weight which is to be attached to each viewpoint and to each factor. The varying statutes on the subject show the varying ideas and viewpoints. None of these statutes has used the term "reasonable waste of natural gas." Different judges may construe, and, as we have clearly shown, have construed, the act differently and widely at variance with one another. Likewise, the state officials and their deputies, as well as the court, are each left free to adopt his own arbitrary standard, viewpoint or concept which they could change and vary at will.

Notwithstanding all these complexities and uncertainties, each producer is required, before expending the large amount of money required to acquire and drill oil wells (in this case, each costs $150,000), or before making contracts, for producing and supplying large quantities of oil or its products, to guess at which of the many possible constructions was intended, and to consider under any viewpoint the many complicated and complex factors and determine them correctly, at the peril that after he has spent his money or made his contract, he will be enjoined or prosecuted. The statute leaves him wholly at sea! The situa-

tion presented for the individual citizen to determine in advance as to what he can and cannot do under the statute is much more complex and intricate than was involved and held void in any of the cases hereinafter cited, decided by this court.

The cases thoroughly establish that where, as in the case at bar, there is no common law or other background defining by judicial decisions the thing prohibited, and the words used in a statute have not obtained a definite meaning through custom and usage, and where the thing prohibited is new and complex, and does not relate to matters of the every-day life of the average man, the statute is void, and lacks "due process," in the absence of a definite and certain guide or standard of conduct, so that those who are called upon to obey it may know with certainty in advance of court action what is prohibited and what is permitted, and also because such a statute permits the exercise of arbitrary and discriminatory powers it also violates the "equal protection" clause of the Fourteenth Amendment. *Cline v. Frink Dairy Co.*, 274 U. S. 445 (distinguishing types of cases cited by appellees); *United States v. Cohen Grocery Co.*, 255 U. S. 81 (distinguishing cases); *Small Co. v. American Sugar Refining Co.*, 267 U. S. 233; *Connally v. General Construction Co.*, 269 U. S. 385; *International Harvester Co. v. Kentucky*, 234 U. S. 216; *United States v. Pennsylvania R. Co.*, 242 U. S. 208; *United States v. Reese*, 92 U. S. 214; *Yick Wo. v. Hopkins*, 118 U. S. 356;

Weed & Co. v. Lockwood, 255 U. S. 104; *United States v. Brewer,* 139 U. S. 278. See also: *Ex parte McNulty,* 77 Cal. 164; *Hewitt v. Board of Medical Examiners,* 148 Cal. 590; *In re Clarence Lockett,* 179 Cal. 581; *People v. Pace,* 73 Cal. App. 548; *In re Peppers,* 189 Cal. 682; *United States v. Capital Traction Co.,* 34 App. D. C. 592, 19 Ann. Cas. 68; *Chicago N. W. R. R. Co. v. Dey,* 35 Fed. 866 (leading case, opinion by J. Brewer); *Tozer v. United States,* 52 Fed. 917 (a leading case); *Louisville & Nashville R. R. Co. v. Commonwealth,* 99 Ky. 135; *Standard Chem. & Metals Corp. v. Waugh Chem. Co.,* 231 N. Y. 51, 131 N. E. 566; *Detroit Creamery Co. v. Kinnane* (Mich.), 264 Fed. 845; *United States v. Bernstein,* 267 Fed. 295; *Cook v. State,* 26 Ind. App. 278, 59 N. E. 489; *In re Schmolke,* 199 Cal. 42; *State v. Board of Canvassers,* 159 Wis. 216, 150 N. W. 542; *In re Toyu Kee,* 12 Haw. 164; *State v. Diamond,* 27 N. M. 477, 20 A. L. R. 1527; *Xenia v. Schmidt,* 101 Ohio St. 437, 130 N. E. 24; *Commonwealth v. Maletsky,* 203 Mass. 241; *Anderson v. Manchester Fire Assn.,* 59 Minn. 182, 60 N. W. 1095; *Dowling v. Lankershire Ins. Co.,* 92 Wisc. 63, 65 N. W. 738; *United States v. Sharp,* Fed. Cas. 16,264, 27 Fed. Cas. 1041.

That the rule applies to civil, as well as criminal, statutes, see: *Cline v. Frink Dairy Co.,* 274 U. S. 445, 463; *Small v. American Sugar Refining Co.,* 267 U. S. 233; *Standard Chem. etc. Corp. v. Waugh,* 231 N. Y. 51, 131 N. E. 566; *Hewitt v. Board of Medical Examiners,* 148 Cal. 590.

The So-Called "Rule of Reason" Does Not Afford a Valid Statutory Standard of Conduct Under the Fourteenth Amendment in a Case Like This.

The word "*reasonable*" (even if not used with "waste," which is equally uncertain and vague) is uniformly held not to be a sufficiently definite standard of conduct, except where used in connection with a subject having a judicially determined or common law meaning, as in the restraint of trade cases, or where used in reference to a simple subject, as in the speed cases, where a person of ordinary intelligence from common and everyday experience is familiar with what is reasonable.

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Cline v. Frink Dairy Company, 274 U. S. 445, ("reasonable profit" in Anti-trust Act. The court distinguishes the speed cases, and other types of cases).

United States v. Cohen Grocery Co., 225 U. S. 81 ("unjust or unreasonable rate of charge" in handling or dealing in or with any necessaries of life—distinguishing other types of cases).

International Harvester Co. v. Kentucky, 234 U. S. 216, 232-233 ("market value under fair competition, and under normal market conditions").

United States v. Pennsylvania R. Co., 242 U. S. 208 (furnishing tank-cars "upon reasonable request and reasonable notice").

Tozer v. United States, 52 Fed. 917, opinion by J. Brewer (prohibiting undue and unreasonable preferences and advantages between shippers).

Louisville etc. R. R. Co. v. Commonwealth, 99 Ky. 132, 35 S. W. 129 (prohibiting from charging "more than a reasonable or just rate").

Schaezlein v. Cabaniss, 135 Cal. 466 (requiring the sanitary condition of the workship or factory "to be reasonably good").

In re Williams, 74 Cal. App. 331 ("reasonable number of teachers" in public dance halls).

See also other cases above cited involving standards not nearly so uncertain and complex as the statute here involved.

This court in the *Cohen Grocery Co. case, supra,* referring to the Lever Act, a so-called profiteering statute, adopted by Congress as a wartime measure, which made it "'unlawful for any person wilfully * * * *to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries*'", held that the statute did not furnish a sufficiently definite or ascertainable standard of guilt under the Federal Constitution. The court said:

> "*Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against.* In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, *to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction finds abundant demonstration in the cases now before us*; since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed. * * *
>
> "And again, this condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of

their own to be used as a basis to render the section possible of execution." (*United States v. Cohen Grocery Co.*, 255 U. S. 81, 89-90.)

It requires no argument or analysis to show that the foregoing statement applies with full force to this case. This case presents a double uncertainty from the use of the words "waste" and "unreasonable", to a much greater degree than the double uncertainty presented in *Connally v. General Construction Co., supra,* involving a state statute of Oklahoma requiring the contractor upon public works to pay "not less than the *current rate* of per diem wages in the *locality* where the work is performed." The court said:

> "And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (269 U. S. 385, 391.)

The court further said that the question could not be solved by resort to construction:

> "*For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the legislature meant one thing rather than another* * * *."

This court said this uncertainty resulted *from the use of words having no fixed meaning in themselves or a meaning made definite by a judicial definition.*

> "* * * The result is that the application of the law depends * * * upon the probably varying impressions of juries * * *. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal." (269 U. S. 385, 394, 395.)

We particularly call the court's attention to the great similarity between the case at bar and the recent decision of this court in *Cline v. Frink Dairy Co.*, 274 U. S. 445, wherein this court held void under the due process clause the Anti-trust Act of Colorado which exempted from its operations an agreement or association "the object and purposes of which are to conduct operations *at a reasonable profit* or to market *at reasonable profit* those products which can not otherwise be so marketed". (274 U. S. 456.) This court said:

> *"Such a basis for judgment of a crime would be more impracticable and complicated than the much simpler question in the L. Cohen Grocery Co. case, whether a price charged was unreasonable or excessive.* THE REAL ISSUE WHICH THE PROVISO WOULD SUBMIT TO THE JURY WOULD BE LEGISLATIVE, NOT JUDICIAL. *To compel defendants to guess on the peril of an indictment whether one or more of the restrictions of the statute will destroy all profit or reduce it below what would be reasonable, would tax the human ingenuity in much the same way as that which this court refused to allow as a proper standard of criminality in International Harvester Co. v. Kentucky,* 234 U. S. 216, 232, 233, 58 L. ed. 1284, 1292, 34 Sup. Ct. Rep. 853." (274 U. S. 457.)

This court clearly analyzed and distinguished *Standard Oil Co. v. United States,* 221 U. S. 1, and other cases, cited in this case by the state courts and appellees, arising under the federal Anti-trust statute laying down the so-called "rule of reason", by saying: "The *common law precedents* as to what constituted an undue restraint of trade were quite specific enough to advise one engaged in interstate trade and commerce what he could and could not do under the statute * * *." The speed and negligence cases were therein distinguished upon the ground

that they relate to matters of common everyday knowledge of what is reasonable conduct so that the average man would know in advance what could or could not be done. After distinguishing these cases, this court said:

> "But it will not do to hold an average man to the peril of an indictment for the *unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result.* * * * *A legislature must fix the standard more simply and more definitely before a person must conform or a jury can act.*" (*Cline v. Frink Dairy Co.*, 274 U. S. 445, 465.)

And in *United States v. Trenton Potteries Co.*, 273 U. S. 392, this court said that by reason of the inherent uncertainty and vagueness of the word "reasonable", "the difference between legal and illegal conduct in the field of business relations" should not be made to "depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies". (273 U. S. 392, 398.)

Applying the foregoing decisions and principles to the statute here involved: Naturally, what may be considered waste or reasonable waste or unreasonable waste will vary greatly, depending upon circumstances, conditions, the factors considered and the viewpoint, and even from the same viewpoint may vary considerably, depending upon different ideas or theories or philosophies of different individuals and groups. Not only will these views, ideas and concepts vary greatly but they will often be diametrically opposed, one to the other. For instance, from the

viewpoint of an operator interested in obtaining the largest financial return from his oil well, if he is using gas in producing oil he is not wasting such gas, for the gas serves a useful purpose in flowing and producing the oil. The transaction from a financial viewpoint is profitable and his own finances may be such that he needs the money. Certainly if he is using no more gas than is reasonably necessary to efficiently operate his well, and his operations are not injuriously affecting the wells of other owners or operators in the same zone or field, and if he secures from the natural gas so used all of the casing-head gasoline which may be produced therefrom, and if he uses or sells all the residual dry gas that he is able to use and sell, and the remaining dry gas is not salable or usable and cannot profitably be stored, he is not unreasonably wasting such natural gas, or even wasting it.

The term "waste" is the antithesis of "use", but what degrees of utilization are required by this statute, and how many times must the gas be used? When does utilization of natural gas become waste? If it is used at all, is it wasted? Does the word "waste" mean dissipation, underground waste, economic waste, or financial waste? By what test or standard can it be determined whether natural gas is expended unnecessarily, carelessly or without valuable result, or applied to useless ends? By what means can it be determined what constitutes useless consumption or expenditure? What factors are to be considered in determining whether there is a "loss without equivalent gain"? These questions, and perhaps many others, might be asked in attempting to ascertain the test or criterion of what was intended to constitute the waste of natural gas. Assuming, for the

sake of argument, they could be answered, by what test or criterion could it then be determined when such waste is "reasonable" and when it is "unreasonable", for as this second question is answered will depend the answer to the question whether the conduct of the individual is permitted or prohibited.

Assuming that an average of 2500 cubic feet of natural gas per barrel of oil is produced in Santa Fe Springs oil field, whereas in Signal Hill oil field the ratio is 5000 to 1 and in Ventura Avenue oil field it is 10,000 to 1, and in Kettleman Hills oil field it is 20,000 to 1, so that the utilization of gas in producing oil in Sante Fe Springs is twice as great as it is in Signal Hill, four times as great as it is in Ventura Avenue, and eight times as great as it is in Kettleman Hills, in that the same quantity of natural gas will produce this much more oil, are the Kettleman Hills and the other fields having a higher gas-oil ratio to be shut in and cut down; and if so, according to what rule, guide or standard? Is the available market or gas outlet to be the measure of the amount of gas that can be utilized in producing oil or which may be blown into the air? If so, what provision of the statute can be pointed to for laying down this rule? If so, the company fortunate enough to have secured or able to secure a market for its gas, perhaps sufficient to consume all gas produced by it, can operate all of its oil wells to capacity, whereas his less fortunate competitor will be able to produce little or no oil. One oil field, by reason of a larger or more continuous supply of natural gas, may have caused pipe lines to be constructed to it sufficient to supply all or a large part of the current demands, whereas the producers

in another oil field coming into production later, or which may be remote from the market centers of natural gas, will be able to produce less oil, or perhaps no oil at all. Is the optimum gas-oil ratio of each well or the reasonable gas-oil ratio of the zone or of the whole field the measure? Or to what extent is each a factor? Are the current demands for oil a factor, and to what extent? Are we to consider the local demands, the state demands, or the national demands? To what extent are existing contracts calling for present or future deliveries of oil to be taken into consideration? To what extent are provisions of the oil leases which require diligent drilling and operation to be considered? To what extent is the tremendous cost of drilling and existing investments to be considered? To what extent are the financial obligations of the individual operator, and his dependency upon the production of oil to meet them to be considered? To what extent are natural conditions which vary in different fields and in different oil producing strata or zones in the same field, and which vary even in the same zone in different parts of the field and which vary in each well during its life and which are not known until penetrated by the drill after a large investment, to be considered? If the enforcement of the statute under any of the varying concepts of the statute will cause the oil operator to lose his investment, or to fail to realize an adequate return therefrom, or to be unable to meet his financial obligations, or to lose his oil lease, or to be unable to meet his contracts for delivery of oil, or to shut in or kill any of his oil wells, is such resulting *waste* and loss of property and money a factor, and if so, to what extent?

The foregoing and many other important questions arise, and so far as the statute is concerned the operator is wholly in the dark as to how these questions are to be answered, and hence is unable to make a contract to drill a well, or a contract for the delivery or sale of oil or gasoline, or a contract for future delivery of gas, or to determine his present or future operations—with any assurance that he can perform, or that his conduct or operations will not later be held in violation of this statute or that he will not be prosecuted under its penal provisions.

The absolute uncertainty and lack of any certain guide or standard for obedience to this statute is further exemplified by the varying and shifting interpretations which have been placed upon it by opposing counsel as well as by attorneys for other oil companies interested in its enforcement. For instance, the director of natural resources and opposing counsel in the original complaint pray for and request an order limiting the amount of natural gas which can be produced with a barrel of oil out of any well in Sante Fe Springs oil field to 2500 cubic feet per barrel, and in addition to this to prohibit the escape or blowing into the air of *any* of the natural gas so produced. [R. 55.] This was sought, notwithstanding that the gas-oil ratios in different zones and in the same zone in different parts of the field and even in the same well, are controlled largely by the laws of nature and vary widely, and a great many of them exceed the above mentioned ratio, and notwithstanding that there are no present available uses or market for much of the gas produced, with the result that a large number of wells which could not be cut down below such ratio would have to be shut down and

killed. Next, during the course of the hearing, they suggested raising the gas-oil ratio limit to 3000 cubic feet per barrel. Then next, an amendment to the complaint was filed in which they set up that the blowing into the air of more than 10% of the natural gas produced from any well would constitute unreasonable waste [R. 267]. They proposed an injunction cutting the then daily production of approximately 524,000,000 cubic feet of gas per day down to 300,000,000 cubic feet of gas per day and prorated the allowable gas production from each lease in proportion to the potential oil production from such lease. Then they produced the form of preliminary injunction which was granted, which limited the gas production from the field to the available uses and outlets for natural gas with a permissible margin of 100,000,000 cubic feet of gas per day, and allocated this allowed gas production on the basis of only 1200 cubic feet of gas to each barrel of the oil potential of each lease. So far as the preliminary injunction is concerned, there is nothing in it prohibiting any operating well from blowing ALL the allowed production to the air [see R. 288]! The effect of this drastic order on petitioners is set forth in the petition and the statement of facts herein. Yet on page 21 of respondents' brief in the lower court it is said that this order is most reasonable and might be made "much more restrictive." Finally, on pages 15-19 of respondents' said brief, we find still another definition of unreasonable waste and allowable blow to the air drawn out of the magic box of the director of natural resources and his counsel. On page 19 thereof, he says:

> "Any production with a gas-oil ratio above 8000 cubic feet of gas should be prohibited by the final decree."

If such a formula exists or if the criterion of gas outlets with a reasonable tolerance of waste was intended by the Legislature to be the limit of gas which may be used in producing oil,—the Legislature should have laid it down in clear and unmistakable terms.

The mere fact that so many variant, shifting views can be thus brought forward and suddenly thrown at the individual operator, shows the absolute lack of any test or criterion laid down in the statute. Such a statute is like the sphinx of Greek mythology, a winged *monster*, represented with a woman's head and a lion's body, *that destroyed those unable to guess* a riddle that she propounded. It is because of the lack of a standard prescribed by the Legislature which the citizen can understand and apply with any degree of safety, and which advises him in advance what he can and cannot do, that the courts have so uniformly condemned statutes of this sort. However honest or sincere public officials may be, the fact that arbitrary action is permitted by the statute is sufficient to condemn it, for the reason that it violates the fundamental principle that this is "a government of laws and not of men."

Mr. Weil, attorney for the General Petroleum Company, who with other counsel for major oil companies participated to a great extent in drafting the provisions of the statute here involved, frankly stated at the hearing of the preliminary injunction (in substance) that the intent of the drafters was that utilization of natural gas, beyond what was necessary to produce the amount of oil required to supply the current demands for oil, should be regarded as unreasonable waste and that was as far as the statute

went. The attorney for the Shell Oil Company contends that the term "unreasonable waste" is limited to physical waste.

In the complaint filed by plaintiffs against operators in the Signal Hill oil field which, although much smaller than Santa Fe Springs oil field, is divided into zones with a different gas-oil ratio for each zone, and in the complaint against the operators of the Kettleman Hills oil field, no gas-oil ratio limit whatever is requested. In the Ventura Avenue oil field the proceeding was instituted before the Supervisor of Oil and Gas and an appeal taken from his order to the district board controlled by the operators in that field: they were satisfied with the order so made by themselves on the appeal. We cite these instances, not with the idea of having them considered as evidence in any way, but as showing the many possible and different interpretations which may be placed upon the provisions of the statute which we claim to be void because of vagueness and lack of a sufficiently definite criterion or standard for the citizen to determine with certainty in advance what he can and cannot do under its provisions. As justification for this line of argument, the Supreme Court of the United States, in the *Cohen Grocery Company* case, appends in its footnote the instructions to the jury given by various lower courts in construing the Lever Act which was a wartime and emergency measure to prevent the charging of unreasonable profits upon necessaries of life. Certainly the necessity of protecting the people from profiteering in the necessaries of life during the emergencies of war far exceeds the alleged emergency for conserving natural gas in California. * * *

The statute is incapable of construction as merely a regulatory enactment. It vests in the supervisor of oil and gas (if the statute is sought to be enforced through the provisions of sections 8d, etc.), in the first place; and a judge of the Superior Court (if the statute is sought to be enforced through the provisions of section 14b), in the second place; or in a judge or jury (if the statute is sought to be enforced through the penal provisions of section 21), in the third place—arbitrary power, not only to regulate but to destroy. The word "arbitrary" is defined by Webster to mean "not governed by any fixed rule or standard," and is used by us in that sense.

The vice of the statute lies, not in the difficulty of applying a rule or standard laid down in the statute, as suggested by counsel, but in the impossibility of determining by establishing canons of construction what criterion or test or guide or standard is to be used in determining whether the statute has been violated or not, for the statute nowhere defines the term "waste of natural gas" or "reasonable waste of natural gas" or "unreasonable waste of natural gas." However cautious, careful and law-abiding a citizen may be, he is required to guess, at his peril, as to what is prohibited or permitted. As stated in the *Cohen Grocery Company* case, *"It leaves open * * * the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against."*

The Uncertainty Is Not Eliminated by Reference to Other Provisions of the Statute.

Opposing counsel suggest that the uncertainty in the statute is eliminated by the emergency clause of the 1929 statute, inserted therein for the purpose of exempting the statute from the referendum provisions of our Constitution. However, the recital referred to merely declares that

> "There is now being blown into the air and wasted on the average of approximately 500,000,000 cubic feet of gas daily. New fields producing heavily of natural gas are being opened up, which would *tend* to add to the amount of natural gas being blown into the air and wasted and lost."

It will be noticed that this clause does not state that the gas blown into the air and lost is "*unreasonably wasted.*" The statute permits a reasonable waste of natural gas, and it may well be that much or even all of the gas referred to comes within this category.

Section 8d of the Act might throw light upon what is and what is not to be regarded as an "unreasonable waste" of gas where gas is produced from any *oil* well, except for the provisions thereof hereinafter referred to, and except for the fact that it is void under the federal Constitution for the reasons hereinafter set forth, so that it cannot be used against appellants.

Section 8d provides that upon complaint being made to the director of natural resources by any person operating in an oil field, or upon the suggestion of the supervisor of oil and gas, alleging that an unreasonable waste of gas exists or is threatened in any field or fields, he shall order the state oil and gas supervisor to hold a hearing and to

give notice of the time and place thereof as prescribed therein, both by publication and by notice to each lessor, lessee or operator of any oil and gas well in said field in so far as known to him. The section then provides that all persons interested shall be entitled to be heard and present testimony either oral or written, and provides for subpoenaing of witnesses, taking of depositions, etc. The section then contains the following language:

> "* * * Upon the conclusion of said hearing the state oil and gas supervisor shall determine whether or not there is an unreasonable waste of gas in said field, in existence or threatened, and shall also determine *the extent to which the waste of gas therein occurring or threatened is unreasonable.* If it shall appear that gas is being produced from *any oil well or wells in quantities exceeding a reasonable proportion to the amount of oil produced from the same well or wells, even though it is shown that* SUCH EXCESS *gas is being used in the generation of light, heat, power or other industrial purpose and that there is* sufficient other gas available for such uses from other wells in the same or other fields in which the gas produced is *not in excess of the amount which bears a reasonable proportion to the amount of oil produced from such other wells* and that there are adequate gas-pipe-line connections between such other wells and the place of utilization of such gas the state oil and gas supervisor shall hold that *such excess production of gas is unreasonable waste thereof if such holding will not cause an unreasonable waste of gas in any other field.* If the waste of gas be found unreasonable an order shall be made directing that such unreasonable waste of gas shall be discontinued or refrained from TO THE EXTENT STATED IN SAID ORDER. * * *"

Here we find a concrete case which may be illustrated thus: If it is found that oil well *A* is producing gas in quantities exceeding a reasonable proportion to the amount

of oil produced therefrom, even though said excess is being used in the generation of light, heat, fuel, power or other industrial purpose, the state oil and gas supervisor is *required* by the *mandate of the statute* to hold that such excess of gas is unreasonable waste, *if there is sufficient other gas available for such uses from other wells in the same or other fields in which the gas produced is not in excess* of the amount of gas which bears a reasonable proportion to the amount of oil produced from such other oil wells and there are *adequate* gas-pipeline connections between such other wells and the place of utilization of such gas *"if such holding will not cause an unreasonable waste of gas in any other field."* But for the words last quoted this might throw some light on some of the matters to be considered! However, these words create more confusion! How can it be told from the statute when such a condition exists? What factors must the operator consider? Furthermore, section 8d makes it uncertain whether the basis or test is each *well* or each *field,* and requires a comparison of both! What are "adequate gas-pipe-line connections"? Each of these would require accurate knowledge of matters under the control of others, such as the gas-oil ratios of other wells, conditions in other fields, and a study of so many complicated economic and other factors, so that even if the section were not so clouded in doubt as to its meaning, it would not be valid as a rule or standard of conduct. The citizen's liberty and property rights cannot be made to depend upon a correct determination of such complex and changing economic conditions, dependent upon so many uncertain factors, knowledge of most of which he could not reasonably be expected to have. What is said in *Cline*

v. Frink Dairy Company, supra, by Chief Justice Taft completely settles this.

However, section 8d cannot be resorted to in construing the statute so as to make it valid against appellants. As already pointed out, that section is wholly void under the Fourteenth Amendment in that, although the supervisor of oil and gas finds an unreasonable waste of natural gas to exist, he is expressly permitted and authorized to order that the same may be discontinued only *"to the extent stated in said order"*. The vesting of this arbitrary, unguided and uncontrolled power brings the section exactly within the rule laid down by this court in *Yick Wo v. Hopkins,* 118 U. S. 356, where a similar power was attempted to be vested in public officials.

The plain invalidity of the provision of the section respecting the order authorized to be made at the conclusion of the hearing and proceedings provided for in section 8d, with which alone said section deals, and without which the section is so meaningless and useless that it clearly would not have been adopted, invalidates the whole section. This is made clear by what this court said in *Williams v. Standard Oil Co.,* 278 U. S. 235, in a similar situation where the statute declared that the invalidity of any provision thereof shall not affect the remainder thereof.

The elimination of section 8d from the statute leaves absolutely nothing in the statute throwing any light upon what standard of conduct is intended by the prohibition in section 8b against unreasonable waste of natural gas.

It may be argued that since the proceedings against appellants are not under section 8d and 14a but were under the alternative procedure specified in section 14b of the

statute appellants are not in position to complain, but the unsoundness of this view at once appears when it is considered that the provisions of section 8d are what the lower court relied upon in upholding the validity of the statute as against appellants' contention that it is void for uncertainty and lack of a sufficient standard, as will presently be shown. It also operates to deny appellants the "equal protection of the laws" (Point J, *post*).

The Provision of Section 8b of the Statute, Making the Blowing or Escape Into the Air of Natural Gas Prima Facie Evidence of Unreasonable Waste, Does not Aid the Statute.

The statute impliedly permits a reasonable waste of natural gas, and this provision merely places the burden of proof upon the operator to show that gas escaping or being blown into the air is reasonable waste and not unreasonable waste. Section 1833 of the California Code of Civil Procedure provides that *"Prima facie* evidence is that which suffices for proof of a particular fact *until contradicted and overcome by other evidence."* When a citizen assumes this burden of proof and produces evidence of the circumstances and the reasons and causes for gas being blown or escaping into the air, then the supervisor of oil and gas, or the judge or jury, as the case may be, has to determine from all of the evidence, including the *prima facie* presumption, whether there has or has not been an unreasonable waste of such natural gas. *But this does not aid the statute, for no guide or standard or test or criterion is laid down by which to determine whether or not the escape is waste or reasonable waste or unreasonable waste.* So we come back to the point from which we

started in our effort to determine whether there is any ascertainable or sufficiently definite test or standard or criterion provided in the statute to determine whether any given conduct is prohibited or permitted. Besides, this provision of the statute is itself also in violation of the due process clause of the federal Constitution (see point H hereof).

Recourse Cannot Be Had to the Statutes of Other States to Determine What Is Meant by "Unreasonable Waste of Natural Gas" in the California Statute.

We have examined these statutes and found them to be quite specific and definite. None of them or the decisions applying them uses the phrase "unreasonable waste of natural gas." They each define with particularity what is prohibited, and are varying in subject matter, scope, extent and nature. Assuming, for the sake of argument, that the Legislature intended that resort should be had to the statutes of sister states, the Legislature would be adopting by reference the statutes of other states, which cannot be done in any event, and the intent so to do must be expressed. The question would arise, should this court follow the Oklahoma statute, or should it follow the Indiana statute, or the Texas statute, or any other statute? Which definition and which statute is to be followed? Which of them expresses the particular legislative policy of this state? Obviously the very idea is absurd! As said by this court:

> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." (*United States v. Reese*, 92 U. S. 214, 221.)

The Water Cases Cited by the Lower Court Are Not in Point.

The lower court in its opinion [R. 333] cites a number of suits in equity between private parties in controversies respecting subterranean waters. *None of these cases involved any statutes, and hence did not discuss or deal with the subject of the requisite certainty essential to a valid statute.* Furthermore, what is a reasonable use of percolating water on certain land, throws no light on what is a reasonable or unreasonable waste of natural gas. The former is fairly definite and certain, and is a matter so commonly settled by usage, custom and general experience, that, if used in a statute, it would come within the classification of the negligence and speed cases made by Chief Justice Taft in *Cline v. Frink Dairy Co., supra.*

In this case this court said:

> *"The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation* (A. B. Small Co. v. American Sugar Ref. Co., 267 U. S. 233, 238, *et seq.*, 69 L. ed. 589, 593, 45 Sup. Ct. Rep. 295), but *the fact that it is often necessary to investigate and decide certain questions in civil cases is not controlling or persuasive as to whether persons may be held to civil or criminal liability for not deciding them rightly in advance.* On questions of *confiscatory rates* for public utilities, for instance, courts must examine in great detail the circumstances and reach a conclusion as to a reasonable profit. But this does not justify in such a case holding the average member of society in advance to a rule of conduct measured by his judgment and action in respect to what is a reasonable price or a reasonable profit." (*Cline v. Frink Dairy Co.*, 274 U. S. 445, 463-464.)

The Statute Is Not Aided by the Provisions for Its Enforcement Through the Courts.

This is established by the last quotation. The standard essential to a valid legislative enactment under the Fourteenth Amendment to which obedience may be required, must be laid down by the Legislature and not by the courts, and must be so definite and certain that "any ordinary person" subject to its provisions "can determine in advance what he may and may not do under it" (J. Brewer, in 35 Fed. 876). It is not enough that as here *"The victim first learns of the existence of law by reading a decree enacting it in which he is condemned for its infraction"* (*State v. Johnson,* 61 Kan. 803, 60 Pac. 1068, 1077). The statute in that case attempted to give the court power to prescribe a schedule of reasonable rates in the form of a court decree and injunction. In condemning it the court used the following apt language:

> "* * * In the usual process of making laws and providing for their enforcement, there is an interim between their enactment and their execution, affording opportunity for thought and preparation by persons affected. Here no time is lost. When a freight rate is established by this court, it goes forth with judicial sanction of REASONABLENESS stamped upon it, and by a chancery decree a fixed rate is promulgated, and simultaneously its fairness judicially determined. *Thus the victim first learns of the existence of law by reading a decree enacting it, in which he is condemned for its infraction."* (60 Pac. 1077.)

This last sentence fits our case exactly. The victims (appellants) first learned of the existence of the law, laying down and also enforcing a rule of conduct by reading a decree exacting it, in which they and their property

are condemned for its infraction and immediately they are restrained and required to comply therewith.

None of the cases cited on page 29 or elsewhere in appellees' brief involved the question of the uncertainty of the statute or of its validity under the Federal Constitution, except *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama I. P. Co.*, 240 U. S. 30, where the court held it had full jurisdiction on this ground, and denied the motion to dismiss.

We therefore respectfully submit that the state statute involved is void on its face under the "due process" clause of the Fourteenth Amendment; that this federal question is inseparably interwoven with the jurisdiction of the court under the authorities above cited; that, under the principles and authorities set forth under *Point D* hereof and under this *Point G*, the state court has no jurisdiction under, or to enforce, such a statute; that, for the reasons under this point alone set forth, the judgment of the lower court must be reversed, and hence the motions to dismiss or affirm should be promptly denied.

POINT H.

The Prima Facie Evidence Clause of the Statute Violates the Due Process Clause of the Fourteenth Amendment.

Section 8d of the statute provides:

> "The blowing, release or escape of natural gas into the air shall be *prima facie* evidence of unreasonable waste."

The legislative declaration that proof of one fact or group of facts shall constitute *prima facie* evidence of an ultimate fact or issue, is valid under the Federal Constitu-

tion only if there is a rational connection between what is proved and what is to be inferred from it. The mere escape of gas throws no light upon, and does not in the least tend to prove, whether either the normal gas-oil ratio for the field or the best mean or optimum gas-oil ratio for each well is exceeded. Necessarily, some gas is produced with the oil, for they are found together in California, and neither can be produced without the other. If gas escapes at the well it therefore does not in the least tend to prove or disprove whether the proportionate gas and oil produced at the well is in the proportion required by the statute. If the gas escapes from the casinghead head plant after being produced from the well, it likewise does not tend to prove or disprove the reasonableness of the proportion of gas to oil produced from any well. If the gas escapes from either the well or the casinghead gasoline plant, the ordinary inference is that there must be some good reason therefor, for it is a matter of common knowledge that persons take reasonable care of their own concerns. In short, the plain truth is that there is no rational connection between mere escape of gas and the ultimate fact of unreasonable waste of natural gas which is sought to be inferred therefrom, if all the factors to be considered and their relative weight were ascertainable. Reasoning does not lead back from the happening of the escape of gas to its cause. There might be a hundred different reasons or causes therefor, no one of which would lead to the conclusion of waste or unreasonable waste. Since the statute here involved itself, by necessary implication, authorizes some escape of natural gas, and even waste of natural gas if it is not unreasonable,—to make *any* escape of natural gas *prima facie* evidence of unreasonable waste is to

make a lawful and permitted act *prima facie* evidence of an unlawful and prohibited act. This emphasizes the irrational and arbitrary character of the presumption attempted to be created.

How can it be said that the mere fact that natural gas is escaping or is being released or blown to the air furnishes any basis for determining, one way or the other, whether it is escaping or being released or blown unnecessarily or carelessly or without sufficient reason therefor? The plain and obvious inference is that the mere escape of gas furnishes no basis or connection as to the reason or necessity or cause therefor, or as to the reasonableness or unreasonableness thereof. The rational inference which would be drawn therefrom is that it is not being unreasonably wasted.

Since, therefore, "Reasoning does not lead back from the occurrence to its cause," to make the occurrence of the escape of natural gas *prima facie* evidence of unreasonable waste is arbitrary, and it violates the due process clause of the Fourteenth Amendment of the Federal Constitution. (*Western & A. R. Co. v. Henderson,* 279 U. S. 639; *Manley v. Georgia,* 279 U. S. 1; *In re Opinion of Justices,* 208 Mass. 619, 94 N. E. 1044; *McFarland v. American Sugar Ref. Co.,* 241 U. S. 79; *Adams v. New York,* 192 U. S. 585; *Re Peterson,* 253 U. S. 300; *State v. Boswick,* 13 R. I. 211; *Bailey v. Alabama,* 219 U. S. 219.)

Manley v. Georgia, supra, is closely in point. It involved a Georgia statute declaring that a bank insolvency shall be deemed fraudulent and subject the directors to imprisonment unless they repel the presumption of fraud

by showing that the affairs of the bank have been fairly and legally administered and generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe. There, as in the case at bar, the charge against the defendants was in the general language of the statute, in the Georgia case it being alleged that the bank became fraudulently insolvent while the officers and directors were in charge, and in the case at bar it being alleged that the defendants are in charge of various wells and that natural gas is being unreasonably wasted therefrom [R. 43]. Both statutes placed the burden upon the defendant of proving the cause of the general result complained of and negativing every fact, whether act or omission, in the management of the property under their care from which the conclusion or ultimate fact sought to be proved might result. This court said:

> "* * * A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. Bailey v. Alabama, 219 U. S. 219, 233, *et seq.*, 55 L. ed. 191, 198, 31 Sup. Ct. Rep. 145. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' McFarland v. American Sugar Ref. Co., 241 U. S. 79, 86, 60 L. ed. 899, 904, 36 Sup. Ct. Rep. 498." (279 U. S. 1, 6.)

In addition to making the above observations as to the statute, the court used the following language which is

also quite apt in the case at bar because of the inherent uncertainty in the statute:

> "* * * The statute does not specify the elements of the offense; and so the inference is not restricted to any particular point or specific issue. The facts so to be presumed are as uncertain and vague as the terms 'fraudulent' and 'fraud,' contrasted with 'fairly,' 'legally,' 'honestly,' and 'in accordance with law,' when used to describe the management of a bank. Connally v. General Constr. Co., 269 U. S. 385, 391, 70 L. ed. 322, 328, 46 Sup. Ct. Rep. 126; Cline v. Frink Dairy Co., 274 U. S. 445, 454, 71 L. ed. 1146, 1151, 47 Sup. Ct. Rep. 681. Nor is the generality of the presumption aided by the allegations of the accusation. The indictment merely follows the general words of the statute without specifying facts to disclose the nature or circumstances of the charge. * * *
>
> "* * * The connection between the fact proved and that presumed is not sufficient. Reasoning does not lead from one to the other. Hawes v. Georgia, 258 U. S. 1, 4, 66 L. ed. 431, 432, 42 Sup. Ct. Rep. 204. The presumption created by §28 is unreasonable and arbitrary. Bailey v. Alabama, and McFarland v. American Sugar Ref. Co., *supra.*" (279 U. S. 1, 6.)

In California the presumption attempted to be created by the statute does not merely create a temporary inference of fact that vanishes upon the introduction of opposing evidence but, as stated by this court in the *Western & A. R. Co. v. Henderson case, supra,* "creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate" (279 U. S. 639, 644).

Section 1833 of the Code of Civil Procedure of California provides: "*Prima facie* evidence is that which

suffices for the proof of a particular fact, *until contradicted and overcome by other evidence.*" Section 1961 of the said code provides: "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but *unless so controverted the jury are bound to find according to the presumption.*"

In the case at bar neither the statute nor the allegations of the complaint sets forth any particular or specific acts of omission or commission which constitute the alleged unreasonable waste of natural gas by appellants. The necessary fair inference is that the *prima facie* evidence clause of the statute above referred to was relied upon and given full effect. This "net" was so large that appellants were "caught" in its "meshes"!

We therefore respectfully submit that the presumption attempted to be created is unreasonable and arbitrary, and comes within the full condemnation of the previous decisions of this court and violates the due process clause of the Fourteenth Amendment. This certainly presents a substantial federal question requiring full argument and review upon its merits by this court, and consequently a denial of the motions to dismiss or affirm.

POINT I.

The Statute Involved as Applied to Appellants Unconstitutionally Impairs Appellants' Lease Contracts.

The existence of appellants' lease contracts covering the properties operated by them in Santa Fe Springs oil field, and the provisions thereof authorizing and requiring appellants to operate the same continuously and diligently

in the production of oil and gas as long as petroleum in paying quantities can be produced therefrom, and in two instances authorizing and requiring appellants to operate each and every well therein to its maximum capacity under penalty of forfeiture on short notice, fully appears from the record [R. 166-177]. That the effect of a subsequent statute adopted in 1929, here involved, as sought to be enforced and applied against appellants, is to impair these obligations, is set forth in the allegations of the petition [R. 7 *et seq.*], and is admitted by the demurrer.

Against this impairment the protection of Section 10 of Article I of the United States Constitution and of the Fourteenth Amendment thereto was invoked [R. 24, subd. (e), 178]. Our contention must be upheld under the Federal Constitution unless the state legislation involved, as applied to appellants under the admitted facts, can be sustained as a proper exercise of the police power. That it cannot be, is demonstrated by the argument hereinbefore advanced under *Points D, E* and *F* hereof. We particularly call the court's attention to *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, where this court held in a quite similar case that a subsequent statute enacted under the guise of a police regulation, prohibiting the mining of coal under private dwellings or streets in places where the right to mine such coal was reserved and granted in a contract executed prior to the enactment of the statute, went too far and unconstitutionally impaired the obligation of such contract. (See also Cooley's Constitutional Limitations, 8th Ed., Vol. I, p. 583; *Maverick Oil Co. v. Powell,* 237 U. S. 40; *Swiss Oil Corp. v. Powell,* 199 Ky. 863, 251 S. W. 1007.) Certainly this

presents a substantial federal question requiring consideration upon its merits along with the other federal questions presented, and, we believe, requires a reversal of the judgment appealed from. For this additional reason the motions to dismiss or affirm should be denied.

POINT J.

The Statute Involved as Applied to Appellants Denies to Appellants the Equal Protection of the Laws.

There are a number of particulars in which appellants are denied the equal protection of the laws by the statute:

1. It permits other owners or operators in the field to produce gas from their wells in excess of a reasonable proportion to the oil produced therefrom when the excess gas produced is conveniently necessary for the generation of light, heat, power or other industrial purpose. This is in accord with the statements of the lower court. [R. 350-1, 362.] It appears from the admitted facts, the allegations and denials of which were set forth in the petition for writ of prohibition [R. 6]: that appellants have no further available means of any further utilization of the gas which by force of circumstances they release to the air after making several beneficial uses thereof in the production of oil, the manufacture of casing-head gasoline, and for fuel purposes and other purposes upon the various leases in the operations of appellants [R. 7, 12]; that the decrease in the allowed gas production to appellants impairs the ability of appellants to protect themselves against offset wells on large adjoining leaseholds. [R. 14.] It also appears from the answer of appellants in the Superior Court (the allegations and denials of which are re-alleged and incorporated

in the petition for writ of prohibition [R. 6] and are admitted by the demurrer thereto), that the seven major oil companies in California have contracts with various gas companies and others distributing and/or selling natural gas for domestic or commercial purposes, by the terms of which they have secured a market for substantially all of the natural gas produced in Santa Fe Springs field for which there is any demand or market or for which there will be any demand or market for a period of five or ten years, and during the productive life of the natural flow of the wells of the field; that these contracts will provide an outlet for the major portion, or at least a substantial portion, of the natural gas in the wells owned or operated by these companies [R. 130-132]; also that there are one or more offset wells located immediately adjacent to lands upon which appellants have one or more wells penetrating the same oil and gas zones; that none of appellants has been able to secure any such contracts or outlets for natural gas which they are producing and will necessarily have to produce if they are to continue in the business of producing oil, and that they have been unable to find a market or outlet for the resulting dry gas utilized by them in the production of oil and have not even been able to give away such gas, even though they have offered so to do to several of the gas companies distributing and selling natural gas from the field [R. 132-133]; that if all or any of the said major companies having gas contracts are permitted to utilize natural gas produced by them from the field for the purpose of fulfilling such contracts they will be enabled to produce oil in quantities greatly in excess of that which any of appellants can produce and will be enabled to operate their

said wells on immediately adjoining or surrounding premises so as to obtain a material advantage over appellants and to obtain an undue and unjust proportion of the oil in the immediate vicinity of the wells of appellants offsetting the wells of said companies [R. 133-134]; and that appellants are thereby denied the "equal protection" of the laws guaranteed by the Fourteenth Amendment of the Federal Constitution. [R. 135.]

It needs no argument to show that the construction of the statute by the lower court which permits operators of offset wells on adjoining properties to produce more gas than is reasonably necessary in the efficient production of oil in order to supply such excess to gas companies or industries out of the field under contracts which such companies happen to have, and which forces appellants to shut down and kill wells more efficiently operated under one of the lowest gas-oil ratios in the field [R. 8, 12-13], because appellants have no such gas contracts, not only violates the principle of correlative rights but creates an arbitrary and unjust favoritism and discrimination not founded upon any proper classification. The guaranty of the equal protection clause of the Fourteenth Amendment is aimed at undue favor and individual or class privilege on the one hand and hostile and discriminatory operation or inequality on the other. It requires equality of treatment of all persons, even though all enjoy the protection of due process.

> " 'While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such

classification is imposed; and classification cannot be arbitrarily made without any substantial basis.'"

Truax v. Corrigan, 257 U. S. 312, 337.

That these constitutional requirements are thus violated, see, also: *Cotting v. Godard,* 183 U. S. 79; *McFarland v. American Sugar Ref. Co.,* 241 U. S. 79; *Hayes v. Missouri,* 120 U. S. 68; *Yick Wo v. Hopkins,* 118 U. S. 356, 366-7.

2. The statute also denies appellants the equal protection of the laws, in that section 8d of the act grants to the state supervisor of oil and gas the arbitrary, uncontrolled and unguided power, even though an unreasonable waste of gas be found to exist, to order the discontinuance thereof only "to the extent stated in said order," resulting in favoritism and discrimination as between appellants and their competitors.

Under section 8d of the act, which has been used as an alternative method of enforcing section 8b of the statute against appellants' competitors, the supervisor of oil and gas is authorized, even though he finds an unreasonable waste of natural gas to exist, to order the discontinuance thereof only "to the extent stated in said order" without power in the state to review such order. Section 9 provides for an appeal by any injured operator in the field to the District Board therein referred to whose members are elected by the operators themselves (Sec. 10). While this board has power to modify, affirm or set aside the order of the supervisor of oil and gas its findings are, for all practical purposes, conclusive, for the power of the state under section 14a is merely to enforce obedience of the final order made by the district board. The express

grant of power to the supervisor of oil and gas, even though finding an unreasonable waste of gas to exist, to prohibit the same "only to the extent stated in the order" gives him unguided, uncontrolled and arbitrary power, so that he can freely punish his enemies and favor his friends. Thus the statute is made "a government of men and not of laws." Such a provision clearly violates the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution. *(Yick Wo v. Hopkins, supra.)*

3. The provision for an appeal to a District Board elected by the operators themselves, and in which the voting power is unequal, being controlled by the *property qualification* of the extent of oil produced by the various operators in the district (Sec. 10), in effect gives a majority in voting power and/or number of the operators power to control the nature and extent of the use to which other operators in the district can make of their property. This is in direct violation of the due process and equal protection clauses of the Fourteenth Amendment. (*Eubank v. Richmond*, 226 U. S. 137.) This court in that case said:

> "* * * The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determines not only the extent of use, but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience, or welfare served by conferring such power? * * *

"We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence,—even, it may be, the kind of business or character of residence. *One* person having a two-thirds ownership of a block may have that power against a *number* having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property, exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power.

"The case requires no further comment."

266 U. S. 137, 144.

The particular facts showing the injurious operation and application of these provisions so as to deny appellants herein the equal protection of the laws, are set forth in the answer of appellants filed in the Superior Court [R. 164-166], the allegations of which were incorporated and made a part of the petition for writ of prohibition [R. 6] and are admitted to be true by the demurrer thereto. These admitted and uncontradicted facts present a clear case of the violation of the "equal protection" clause of the Fourteenth Amendment.

3. There is another particular in which appellants are injured and directly affected by the provisions of section 8d above referred to, giving discriminatory and arbitrary power to the supervisor of oil and gas thereunder. In that part of the argument showing that the statute is void for uncertainty under the due process clause of the Fourteenth Amendment (Point G hereof),

as well as in the opinion of the lower court [R. 350-1], it appears that the only thing in the statute throwing any light upon what is meant by unreasonable waste of natural gas, which is prohibited by the statute, is contained in section 8d. The lower court relied upon the provisions of that section in construing the statute. The invalidity of the provisions of section 8d respecting the arbitrary power of the supervisor of oil and gas in the order which may be made thereunder, clearly invalidates the entire section, which deals only with the proceedings leading up to the making of such order. (*Williams v. Standard Oil Co.*, 278 U. S. 235.) It therefore follows that for this additional reason appellants are injuriously affected thereby.

4. Section 8d is also invalid, in that it vests *judicial* power in the supervisor of oil and gas of determining the property rights of appellants' competitors and the extent to which the statute shall be enforced as to them, which violates the "due process" clause of the Federal Constitution. Due process of law, where adjudication of property rights of citizens is involved, requires a hearing and determination by a properly constituted *judicial* tribunal. This alone renders section 8d wholly void and invalid, so that the state courts could not properly look to it in construing the statute. In addition, we particularly wish to emphasize, that appellants are denied the equal protection of the laws, because the same statute is enforced against their competitors not only by a non-judicial officer, but also by an officer who is given arbitrary, uncontrolled and unguided power (even though he finds an unreasonable waste of natural gas exists in any of the wells or upon any of the properties of appellants' competitors),

to make an order restricting such unreasonable waste of natural gas only "to the extent stated in said order"; whereas the statute is sought to be enforced against appellants in a court action, not expressly vested with the same arbitrary power. The two methods of enforcing the statute were inserted by design to accomplish just such a result. Whether this court can take notice of this fact or not, the existence of such an inequality, and the discrimination which the record shows has arisen therefrom, clearly present a case in which appellants are denied the "equal protection of the laws" guaranteed to them by the Fourteenth Amendment.

Certainly a substantial federal question as to whether the equal protection clause of the Fourteenth Amendment is violated is presented which should be thoroughly considered on its merits after full argument. For this further reason the motions to dismiss or affirm should be denied.

POINT K.

If Appeal Was Improvidently Sought and Allowed, Then Certiorari Should Be Granted Upon the Papers Whereon the Appeal Was Allowed.

If appeal was improvidently allowed, then, treating the papers whereon the appeal was allowed as a petition for certiorari, the judgment should be reviewed on certiorari. We sincerely believe that the appeal was properly allowed, and that this court's jurisdiction attaches under section 237*a*, U. S. Judicial Code, in that it seeks to review a final judgment in a suit in the highest court in a state in which the decision could be had, where is drawn into

question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity. We believe the foregoing exposition fully demonstrates the substantial character of the federal questions involved and requires a denial of the motions to dismiss or affirm.

If one or more of the federal questions raised on the appeal are such that, standing alone, they could be raised only upon certiorari, this court nevertheless has jurisdiction on the appeal to determine them if the court finds that the record has been properly brought here upon appeal, because involving the constitutionality of the state statute. (*Prudential Ins. Co. v. Cheek,* 259 U. S. 530, 547.)

This court has jurisdiction on certiorari to review a final judgment rendered or passed by the highest court in a state in which a decision could be had where is drawn in question the validity of a statute of any state upon the ground of its being repugnant to the Constitution of the United States, "or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution * * * of * * * the United States" (section 237*b*, U. J. Judicial Code). We believe, however, that under the decisions of this court cited herein that appeal, rather than certiorari, is the proper remedy. It is out of an abundance of caution that we present herewith, as a part of the appeal proceedings and an integral part of this brief (printed in the supplement hereto), a formal Motion and Petition for a Writ of Certiorari under section 237 (b) and (c) U. S. Judicial Code.

Conclusion.

We respectfully submit that each of the federal questions presented is within the jurisdiction of this court to review on appeal; that they are substantial, novel, important and far-reaching, and are of general public interest; that they require full and thorough presentation and consideration upon their merits; and that a full examination by this court of the merits of the federal questions presented in the light of the admitted facts, and the previous decisions of this court, will require that the judgment of the lower court be reversed. Therefore the motions to dismiss or affirm should be promptly denied.

As this court said, in *Fairmont Creamery Co. v. Minnesota,* 274 U. S. 1, 9, respecting the public policy of a statute also claimed to be necessary for the welfare of another great industry:

> " 'Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.' "

Respectfuly submitted,

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